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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 411

YVETTE J. MADSEN, PETITIONER,

vs.

NINA KINSELLA, WARDEN OF THE U. S. REFORMATORY FOR WOMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI—FILED JULY 26, 1951

CERTIORARI GRANTED NOVEMBER 5, 1951

411

NO. ~~82 MISC.~~

Office-Supreme Court, U. S.
FILED
JUL 26 1951
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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, *Appellant*,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

APPENDIX TO APPELLANT'S AND APPELLEE'S BRIEFS

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.
JOHN C. MORRISON,
Counsel for Appellant

A. GARNETT THOMPSON,
United States Attorney
JOHN M. RAYMOND,
Assistant Legal Adviser
United States State Department
JOSEPH M. SWEENEY,
Assistant Legal Adviser
United States State Department
Counsel for Appellee

FILED
MAR 7 1951
CLAUDE M. DEAN
CLERK

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, *Appellant*,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON

APPENDIX TO APPELLANT'S AND APPELLEE'S BRIEFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent*.

H. C. No. 1095

PETITION FOR WRIT OF HABEAS CORPUS

The petition of Yvette J. Madsen by her attorneys, Joseph S. Robinson of New York City, Dayton M. Harrington and James D. Graham of Washington, D. C., and

Carl J. Nutter of Charleston, West Virginia, upon information and belief, respectfully shows:

1. That petitioner, Yvette J. Madsen, is a citizen of the United States and a resident of the Borough of Brooklyn, City and State of New York; that she was the wife of Lieutenant Andrew E. Madsen, now deceased, and is the mother of two infant children; that in or about the month of November 1947, petitioner and her husband entered the American Zone of Occupied Germany as a part of the Military Forces of the United States maintained in that area; that after their arrival, petitioner and her husband were granted facilities and billets reserved exclusively for the Occupation Forces; that petitioner's status as a person accompanying the Armies of the United States without the territorial jurisdiction of the United States had not changed up to the time of her arrest hereinafter referred to.

2. That while residing in the American Zone of Occupied Germany as hereinabove set forth, and on or about October 20, 1949, petitioner was arrested by the Air Force Military Police and charged with a violation of the German criminal law before a so-called United States Military Government Court. The said Court, sometimes referred to as an Occupation Court, was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law and was wholly devoid of jurisdiction over the person of the accused and the offense charged, and said Court was without power to invoke the provisions of German law against a citizen of the United States, particularly a person accompanying and serving with the Armed Forces of the United States, and said Court was in fact functioning in violation of the express mandate of the Congress of the United States, i.e., Article of War II and other provisions of Federal Law as well as the Constitution of the United States.

3. That thereafter and in the month of February 1950, petitioner was brought to trial before a different court, one which called itself "The United States Court for the Allied High Commission for Germany, 4th Judicial District," which Court was sought to be established by the State Department or Executive Branch of the Government of the United States in violation of the Constitution and laws of the United States, and which Court, like the one referred to in Paragraph 2 hereinabove, was also devoid of jurisdiction over the person of petitioner and the offense charged and was without power to try a citizen of the United States who was accompanying the Armed Forces of the United States in an occupied territory for an alleged violation of German law, and the proceedings against petitioner instituted in one court and carried on in the other were illegal, void and of no effect.

4. That no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District," a tribunal whose asserted jurisdiction is alleged to stem from sources different from the United States Military Government Courts; nor was any indictment ever filed against petitioner in said court and, in fact, the proceedings against her in said tribunal, before, during and after the trial, were conducted in contravention of the express mandates of the Constitution and laws of the United States and without regard to due process of law under the American Judicial system.

5. That on or about March 18, 1950, the three civilians who composed the so-called United States Court for the Allied High Commission for Germany, in a proceeding brought not in the name of the Sovereign power of the United States, but in the name of the "Office of the United States High Commissioner for Germany against Yvette J. Madsen," and charging a violation of Paragraph 211 of the German Criminal Code, entered an

order directing that petitioner be imprisoned for a term of fifteen years at Alderson, West Virginia, or "elsewhere as the Secretary of the Army may direct." Such order was a nullity because it violates both the Constitution and laws of the United States and because it was signed and entered by persons who were without power to act and who were never properly appointed United States Judges with the approval of the United States Senate as required by law, and the said civilians acting ostensibly as judges assumed criminal jurisdiction over an American citizen accompanying the Armed Forces of the United States although in law and in fact no jurisdiction, such as they sought to exercise, was ever legally vested in them. It is pursuant to the order of said civilians, who function either under the Department of State or under the Department of Defense but not under and as a part of the United States Judiciary, that petitioner was ordered held in confinement.

6. Pursuant to procedure established in the so-called Allied High Commission Courts and to exhaust all remedies available to petitioner, even though the exhaustion of such remedies constituted an empty formality, an appeal was taken to a tribunal called The Court of Appeals for the Allied High Commission, which tribunal, like those referred to in Paragraphs 3, 4 and 5 above, was devoid of jurisdiction over the person of petitioner and the subject matter and was without power to make any legal adjudication of the life or liberty of petitioner or to declare that she be held in custody or who shall hold her in custody; and the persons who composed said tribunal lacked power and jurisdiction to make any adjudication respecting petitioner or to direct her confinement in a United States institution as punishment for crime, and respondent herein may not restrain the liberty of petitioner on the order of a tribunal not created, sanctioned or authorized by the Constitution and laws of the United States; and the order of the so-called Court of Appeals

for the Allied High Commission dated 12 May 1950 is null, void and of no effect, and the restraint of petitioner, which is being carried out by respondent, is illegal.

7. Respondent herein named is the warden of the Federal Reformatory for Women located at Alderson, West Virginia, and holds petitioner in custody on the basis of the orders and alleged adjudications of the tribunals referred to in the preceding paragraphs, and said respondent is vested with the power and duty to take such action with respect to petitioner as this Honorable Court may direct.

8. That the acts of the persons composing the tribunals hereinabove referred to in directing that petitioner be confined, and the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States, and the bringing of petitioner to trial as hereinabove alleged and invoking four different systems of law in one proceeding, namely, German law, U. S. Federal law, U. S. Military law, and a body of self-ordained rules, and denying to her the safeguards and protection guaranteed her by the Constitution and laws of the United States, and seeking to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code, was improper and unlawful, and the imprisonment and restraint of petitioner is therefore illegal.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue, or in the alternative that a rule to show cause why a writ of habeas corpus should not issue, be granted, directed to respondent named herein, and commanding that she have the body of Yvette J. Madsen, together with the cause of her imprisonment and restraint, brought forth before the United States District Court for the Southern District of West Virginia, or a judge thereof; and it is further prayed that your peti-

tioner be granted such other, further, and equitable relief as this Court may deem just and proper.

JAMES D. GRAHAM, JR.

DISTRICT OF COLUMBIA) ss.:

James D. Graham, Jr., being duly sworn, deposes and says: That he is one of the attorneys for petitioner herein; that he has read and signed the foregoing petition and that he knows the contents thereof; that all matters therein contained are true, except those matters stated on information and belief, and that such matters he believes to be true.

JAMES D. GRAHAM, JR.

Sworn to and subscribed before me
this 16th day of June, 1950.

Anna E. Hess
Notary Public, D. C.

Joseph S. Robinson,
745 Fifth Avenue,
New York 22, New York.

Dayton M. Harrington
James D. Graham, Jr.,
454 Washington Building,
Washington 5, D. C.

Carl J. Nutter,
Box 553,
Charleston 22, West Virginia.
Telephone 2-4134

Attorneys for the petitioner.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus No. 1095

ANSWER OF THE RESPONDENT, WHOSE CORRECT DESIGNATION IS "NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN", TO THE ORDER ENTERED HEREIN ON JUNE 26, 1950, REQUIRING HER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT ISSUE.

Respondent, for answer to said order, says that the writ of habeas corpus prayed for in the petition lodged in connection with this matter in the office of the Clerk of this court should not be issued and that the petition should be dismissed for the following reasons:

First: Petitioner has failed to apply for relief by motion to the court which sentenced her, as required by 28 U.S.C., Sec. 2255.

Second: The allegations of the petition do not make out a prima facie case for the issuance of the writ or for the release of the petitioner from custody.

Third: The allegations of the petition are not true in the particulars hereinafter mentioned, to-wit:

(1) It is not true, as alleged in Paragraph 2 of the petition, that said United States Military Government Court was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law.

(2) It is not true, as alleged in Paragraph 3 of the petition, that petitioner was brought to trial before a

different court from the court wherein she was charged with a violation of the German criminal law.

(3) It is not true, as alleged in Paragraph 4 of the petition, that no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District."

(4) It is not true, as alleged in Paragraph 4 of the petition, that the proceedings against petitioner in the United States Court for the Allied High Commission for Germany, 4th Judicial District, were conducted in contravention of the express mandates of the Constitution and laws of the United States, and without regard to due process of law under the American judicial system.

(5) It is not true, as alleged in Paragraph 5 of the petition, that no jurisdiction in law and in fact was ever legally vested in said the United States Court for the Allied High Commission for Germany, 4th Judicial District, to exercise criminal jurisdiction over an American citizen accompanying the armed forces of the United States.

(6) It is not true, as alleged in Paragraph 8 of the petition, that the acts of the persons composing the tribunals referred to in directing that petitioner be confined, or that the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States; nor is it true, as in said paragraph alleged, that the bringing of petitioner to trial, as alleged in the petition, was improper and unlawful, or that the imprisonment and restraint of petitioner is therefore illegal. Also, it is not true, as alleged in said Paragraph 8, that four different systems of law were invoked, namely, the German law, United States Federal law, United States Military law, and a body of

self ordained rules, or that petitioner was denied the safeguards and protection guaranteed her by the Constitution and laws of the United States, or that it was improper and unlawful to seek to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code.

Respondent says further that it has not been possible, because of lack of sufficient time since entry of the order to show cause, to obtain a certified copy of the transcript of the proceedings in connection with petitioner's arrest, trial and sentence, but that steps have been taken to obtain a certified transcript of such proceedings for the purpose of attaching it to the return to the writ of habeas corpus should the court be of the opinion to and direct the issuance of such writ.

Although respondent is advised that the court will take judicial notice of many of the matters hereinafter set forth, neverthless in order to make a more understandable and complete answer to said order to show cause, respondent says that the pertinent facts and law in connection with petitioner's arrest, arraignment, trial, sentence, appeal and imprisonment are those hereinafter set forth.

The Country of Germany surrendered in World War II on the 8th day of May, 1945. On the 5th day of June, 1945, the United States of America, United Kingdom, France and the Union of Soviet Socialist Republics assumed supreme authority with reference to Germany to be exercised each in its own zone of occupation.

On the 6th day of June, 1949, the President of the United States, by Executive Order No. 10062, reciting the authority vested in him by the the Constitution and the statutes, including the Foreign Service Act of 1946, and as President of the United States and Commander in Chief of the Armed Forces of the United States, es-

tablished the position of United States High Commissioner for Germany, who should be the supreme United States authority in Germany and who should have authority under the immediate supervision of the Secretary of State, subject to consultation with and ultimate direction by the President, to exercise all the governmental functions of the United States in Germany, other than the command of troops.

By ordinances, Nos. 31 and 32 (14 Federal Register 124), filed on January 10, 1949, and in effect without change at the time of the offense charged against petitioner and at the time of petitioner's subsequent arrest, arraignment, trial, conviction, appeal and imprisonment, except as to the change of name hereinafter referred to, the Adjutant General of the United States established a system of courts for the United States Area of Control in Germany, comprising certain territory which included Buschlag, Germany, and detailed the procedure to be followed in such courts. The courts were designated United States Military Government Courts for Germany. The ordinances provided for eleven judicial districts, with a district court for each district, and provided that the district court, with three judges, or with two judges and one magistrate sitting, might decide any civil or criminal case and impose any lawful sentence, including death, provided that when the accused was charged with an offense under the German law, the court should be limited to the sentence or other penal provisions of such law.

The district courts (Ordinance No. 31, (g), Article 7) were given jurisdiction over all persons in the United States Area of Control, except persons, *other than civilians,* who were subject to military, naval or air force law and were serving with any forces of the United States. They were given jurisdiction of various criminal offenses, among them offenses under German law in force in the judicial district of the particular court.

If petitioner should be considered a person subject to military law and, therefore, within the provisions of said Article that no person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander in Chief, European Command, attention is directed to the fact that the following general authorization was issued by the Commander in Chief, European Command, under date of December 11, 1948:

> "Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742, US Army, 11 December 1948
>
> "To: Chief Attorney, United States Military Government Courts for Germany, APO, 696-A, US Army
>
> "Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offense before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial.
>
> "BY COMMAND OF GENERAL CLAY:
>
> "G. H. GARDE
> "Lieutenant Colonel, AGC
> Assistant Adjutant General"

These ordinances, set forth in full in 14 Federal Register 124, provided a complete and exhaustive set of rules for the commencement of, and procedure in, criminal proceedings. These rules were substantially identical with the rules relating to criminal trials in the United States District Courts in the United States, except there was no requirement of indictment or trial by jury.

By proclamation of December 28, 1949, made by the United States High Commissioner for Germany, the name of the courts set up by the ordinances mentioned, and which were therein designated United States Military Courts for Germany, was changed to the "United States Courts of the Allied High Commission for Germany", and said courts were adopted and continued by said United States High Commissioner for Germany.

On, and preceding, October 20, 1949, petitioner was the dependent wife of Andrew E. Madsen, and resided with him at Buschlag, Germany, in the United States Zone of Occupation, which was also known as the United States Area of Control. Said Andrew E. Madsen was an Air Force Lieutenant with the Occupation Forces of the United States, stationed at Buschlag, Germany. Petitioner had no connection whatever with the Occupation Forces, or with any other department or instrumentality, of the United States. She was not serving with any forces of the United Nations. On the 20th day of October, 1949, she shot and killed said Andrew E. Madsen at their residence in Buschlag.

She was arrested on or about the 20th day of October, 1949, at Buchweg, Buschlag, Germany, by Air Force Military Police of the United States Occupation Forces in Germany, charged with violation of Section 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen died on 20 October 1949.

Section 211 of the German Criminal Code, at that time, read as follows (translated):

> "211. (As amended 4 September 1949, RGBI I, 549). The murderer shall be punished by death.

"A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust):

"For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives:

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

Promptly following her arrest, petitioner was taken before the United States Government Military Court within whose territorial jurisdiction Buschlag, Germany lay, being the court referred to in the petition, and was there arraigned upon the aforementioned charge. She denied the facts and the court accordingly entered for her a plea of not guilty and an additional plea of not guilty by reason of insanity at the time of the commission of the offense charged.

Petitioner was tried in said court on said charge, the name of the court having, in the meantime, been changed, as hereinbefore stated, to United States Court of the Allied High Commission for Germany, and on the 18th day of March, 1950, she was convicted by said court and sentenced to imprisonment for a term of fifteen years. This sentence was within the maximum penalty provided by Section 211 of the German Criminal Code, said section providing for the death penalty or in exceptional cases, life imprisonment.

Thereafter, on March 21, 1950, petitioner filed an appeal to the Court of Appeals, United States Courts of the Allied High Commission for Germany, at Nurnberg, Ger-

many, and her sentence of imprisonment was confirmed by said court on the 12th day of May, 1950. Her imprisonment in the Federal Reformatory for Women, at Alderson, West Virginia, United States of America, followed, in conformity with said judgment.

During all of the court proceedings referred to, she was fully represented by counsel and all such court proceedings were in accordance with the rules and regulations applicable to said courts.

Respondent, therefore, prays that the writ of habeas corpus be denied and that the said petition be dismissed.

NINA KINSELLA
Warden, Federal
Reformatory for Women
Respondent

A. GARNETT THOMPSON
United States Attorney,
Southern District of
West Virginia
Counsel for Respondent

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS:

Nina Kinsella, of full age, being first duly sworn, deposes and says that she is the respondent named in the foregoing answer, that she has read the said answer, and that the facts and matters therein set forth are true to the best of respondent's knowledge and belief.

NINA KINSELLA

Sworn to and subscribed before me this 14th day of July, 1950.

Notary Public for Kanawha
County, West Virginia.

My commission expires_____.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus

No. 1095

RETURN OF THE RESPONDENT, WHOSE CORRECT DESIGNATION IS "NINA KINSELLA, WARDEN OF THE FEDERAL REFORMATORY FOR WOMEN", TO THE WRIT OF HABEAS CORPUS ISSUED IN THE ABOVE-ENTITLED MATTER ON JULY 14, 1950.

Respondent, Nina Kinsella, Warden of the Federal Reformatory for Women, says that the writ of habeas corpus should be dismissed and the petitioner remanded to custody for the following reasons.

First: Petitioner has failed to apply for relief by motion to the court which sentenced her, as required by 28 U.S.C., Sec. 2255.

Second: The allegations of the petition do not make out a case for the issuance of the writ or for the release of the petitioner from custody.

Third: The allegations of the petition are not true in the particulars hereinafter mentioned, to-wit:

(1) It is not true, as alleged in Paragraph 2 of the petition, that said United States Military Government Court was neither authorized, created, nor established pursuant to any provision of the Constitution or laws of the United States, but by military fiat without the sanction of law.

(2) It is not true, as alleged in Paragraph 3 of the petition, that petitioner was brought to trial before a

different court from the court wherein she was charged with a violation of the German criminal law.

(3) It is not true, as alleged in Paragraph 4 of the petition, that no charges were ever filed against petitioner in said "The United States Court for the Allied High Commission for Germany, 4th Judicial District."

(4) It is not true, as alleged in Paragraph 4 of the petition, that the proceedings against petitioner in the United States Court for the Allied High Commission for Germany, 4th Judicial District, were conducted in contravention of the express mandates of the Constitution and laws of the United States, and without regard to due process of law under the American judicial system.

(5) It is not true, as alleged in Paragraph 5 of the petition, that no jurisdiction in law and in fact was ever legally vested in said the United States Court for the Allied High Commission for Germany, 4th Judicial District, to exercise criminal jurisdiction over an American citizen accompanying the armed forces of the United States.

(6) It is not true, as alleged in Paragraph 8 of the petition, that the acts of the persons composing the tribunals referred to in directing that petitioner be confined, or that the acts of respondent in restraining the personal liberty of petitioner in compliance with such orders, are in violation of the Constitution and laws of the United States; nor is it true, as in said paragraph alleged, that the bringing of petitioner to trial, as alleged in the petition, was improper and unlawful, or that the imprisonment and restraint of petitioner is therefore illegal. Also, it is not true, as alleged in said Paragraph 8, that four different systems of law were invoked, namely, the German law, United States Federal law, United States Military law, and a

body of self ordained rules, or that petitioner was denied the safeguards and protection guaranteed her by the Constitution and laws of the United States, or that it was improper and unlawful to seek to make her amenable to the substantive laws of a foreign jurisdiction, i.e., the German Criminal Code.

Fourth: The true cause of the detention of petitioner is as follows:

Germany surrendered in World War II on the 8th day of May, 1945. On the 5th day of June, 1945, the United States of America, the United Kingdom, France and the Union of Soviet Socialist Republics assumed supreme authority with reference to Germany. For the purpose of military occupation, the German territory was divided into four zones. The President of the United States, by virtue of his authority under the Constitution and as Commander-in-Chief of the Armed Forces of the United States designated as the Commander-in-Chief of the American forces of occupation the person in whom the supreme authority to be exercised by the United States in its zone of occupation would be vested.

On the 6th day of June, 1949, the President of the United States by Executive Order No. 10062, reciting the authority vested in him by the Constitution and the statutes, including the Foreign Service Act of 1946, and as President of the United States and Commander-in-Chief of the Armed Forces of the United States, established the position of United States High Commissioner for Germany. The High Commissioner was vested with supreme authority in the United States zone of occupation and the power, under the immediate supervision of the Secretary of State, subject to consultation with and ultimate direction by the President, to exercise all the functions incident to the government of the United States zone of occupation, other than the command of troops.

By ordinances, Nos. 31 and 32 (14 Federal Register 124), filed on January 10, 1949, and in effect without change at the time of the offense charged against petitioner and at the time of petitioner's subsequent arrest, arraignment, trial, conviction, appeal and imprisonment, except as to the change of name hereinafter referred to, there was established, as directed by the Commander-in-Chief of occupation forces who was vested with authority for the government of the United States Zone, a system of courts for the United States Area of Control, comprising certain territory which included Buschlag, Germany, and detailed the procedure to be followed in such courts. The courts were designated United States Military Government Courts for Germany. The ordinances provided for eleven judicial districts, with a district court for each district, and provided that the district court, with three judges or with two judges and one magistrate sitting, might decide any civil or criminal case and impose any lawful sentence, including death, except that when the accused was charged with an offense under the German law, the court should be limited to the sentence or other penal provisions of such law.

The district courts (Ordinance No. 31, (g), Article 7) were given jurisdiction over all persons in the United States Area of Control, except persons, *other than civilians*, who were subject to military, naval or air force law and were serving with any forces of the United States. They were given jurisdiction of various criminal offenses, among them offenses under German law in force in the judicial district of the particular court.

If petitioner should be considered a person subject to military law and, therefore, within the provisions of said Article that no person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command, attention is directed to the fact

that the following general authorization was issued by the Commander-in-Chief, European Command, under date of December 11, 1948:

> "Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742 US Army, 11 December 1948
>
> "To: Chief, Attorney, United States Military Government Courts for Germany, APO 696-A US Army
>
> "Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offense before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial.
>
> "BY COMMAND OF GENERAL CLAY:
>
> "G. H. GARDE
> "Lieutenant Colonel, AGC
> Assistant Adjutant General"

These ordinances, set forth in full in 14 Federal Register 124, provided a complete and exhaustive set of rules for the commencement of, and procedure in, criminal proceedings. These rules were substantially identical with the rules relating to criminal trials in the United States District Courts in the United States, except there was no requirement of indictment or trial by jury.

By proclamation of December 28, 1949, the United States High Commissioner for Germany, as authority responsible for the government of the United States zone of occupation, changed the names of the courts set up by the ordinances mentioned, which were therein designated United States Military Courts for Germany, to the

"United States Courts of the Allied High Commission for Germany", and said courts were adopted and continued by said United States High Commissioner for Germany.

On, and preceding, October 20, 1949, petitioner was the dependent wife of Andrew E. Madsen, and resided with him at Buschlag, Germany, in the United States Zone of Occupation, which was also known as the United States Area of Control. Said Andrew E. Madsen was an Air Force Lieutenant with the Occupation Forces of the United States, stationed at Buschlag, Germany. Petitioner had no connection whatever with the Occupation Forces, or with any other department or instrumentality, of the United States. She was not serving with any forces of the United Nations. On the 20th day of October, 1949, she shot and killed said Andrew E. Madsen at their residence in Buschlag.

She was arrested on or about the 20th day of October, 1949, at Buchweg, Buschlag, Germany, by Air Force Military Police of the United States Occupation Forces in Germany, charged with violation of Section 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen died on 20 October 1949.

Section 211 of the German Criminal Code, at that time, read as follows (translated):

> "211., (As amended 4 September 1949, RGBl I, 549). The murderer shall be punished by death.
>
> "A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust):
>
> "For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives;

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

Promptly following her arrest, petitioner was taken before the United States Government Military Court within whose territorial jurisdiction Buschlag, Germany lay, being the court referred to in the petition, and was there arraigned upon the aforementioned charge. She denied the facts and the court accordingly entered for her a plea of not guilty and an additional plea of not guilty by reason of insanity at the time of the commission of the offense charged.

Petitioner was tried in said court on said charge, the name of the court having, in the meantime, been changed, as hereinbefore stated, to United States Court of the Allied High Commission for Germany, and on the 18th day of March, 1950, she was convicted by said court and sentenced to imprisonment for a term of fifteen years. This sentence was within the maximum penalty provided by Section 211 of the German Criminal Code, said section providing for the death penalty, or in exceptional cases, life imprisonment.

Thereafter, on March 21, 1950, petitioner filed an appeal to the Court of Appeals, United States Courts of the Allied High Commission for Germany, at Nürnberg, Germany, and her sentence of imprisonment was confirmed by said court on the 12th day of May, 1950. Her imprisonment in the Federal Reformatory for Women, at

Alderson, West Virginia, United States of America, followed, in conformity with said judgment.

WHEREFORE, respondent prays that the writ of habeas corpus be dismissed and the petitioner remanded to custody.

s/ NINA KINSELLA
Warden, Federal
Reformatory for Women
Respondent

s/ A. GARNETT THOMPSON
United States Attorney, Southern
District of West Virginia
Counsel for Respondent

STATE OF WEST VIRGINIA }
COUNTY OF MONROE } SS.

Nina Kinsella, of full age, being first duly sworn deposes and says that she is the respondent named in the foregoing return, that she has read the said return, and that the facts and matters therein set forth are true to the best of respondent's knowledge and belief.

s/ NINA KINSELLA

Sworn to and subscribed before me this 21st day of July, 1950.

s/ C. H. BIVENS
Notary Public for Monroe
County, West Virginia

My Commission expires April 21, 1951.

Service of a copy of the within Return is hereby accepted this 24th day of July, 1950.

Of Counsel for Petitioner.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the Federal Reformatory for Women, *Respondent.*

TRAVERSE

Comes now petitioner and by her attorneys traverses the return of respondent to the writ issued herein as follows:

1. Petitioner admits that she has not applied for release by motion to the court which tried her; but states that 28 USC, Sec. 2255, is inapplicable because the court which tried and sentenced petitioner is not "a court established by act of Congress" and is otherwise inapplicable.

2. Petitioner denies the allegation of paragraph Second of the return.

3. Petitioner denies the allegations of paragraph Third, subdivision one to six inclusive.

4. Petitioner admits that respondent holds her in confinement as a result of the judgment of a tribunal entitled, "United States Court for the Allied High Commission for Germany, 4th Judicial District," but denies that the Court had jurisdiction to try her or to impose the sentence, denies that the Court convicted her of an offense against the United States, denies that respondent has any power or authority to hold petitioner in confinement or to execute the sentence of the United States Court for the Allied High Commission for Germany, 4th Judicial District, or to hold petitioner as a person convicted of a violation of Section 211 of the German Criminal Code.

Petitioner further denies such other allegations of paragraph Fourth as contradict the allegations of her petition; and with respect to the other allegations in paragraph 4, denies having knowledge or information sufficient to form a belief as to such allegations.

s/ JOSEPH S. ROBINSON

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOSEPH S. ROBINSON, being duly sworn, deposes and says that he is one of the attorneys for the petitioner herein; that he has read the foregoing Traverse and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

s/ JOSEPH S. ROBINSON

Sworn to before me, this 31st day of July, 1950.

s/ WILLIAM LIEBER
Notary Public for the
State of New York

JOSEPH S. ROBINSON, Esq.
745 Fifth Avenue
New York 22, New York

HARRINGTON & GRAHAM, Esqs.
454 Washington Building
Washington 5, D. C.

JOHN C. MORRISON, Esq.
1601 Kanawha Valley Building
Charleston 22, West Virginia

Attorneys for Petitioner

Court Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner* vs. NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*	Habeas Corpus No. 1095

AGREED STATEMENT OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that for the purposes of this litigation, in addition to what is admitted in the pleadings, the facts herein are as follows (other facts not herein agreed upon may be brought to the Court's attention by either party):

1. The petitioner, Yvette J. Madsen, is a native-born citizen of the United States and a resident of the Borough of Brooklyn, City and State of New York; she was the wife of Lieutenant Andrew E. Madsen, now deceased, and is the mother of two infant children.

2. In or about the month of November 1947 the petitioner and her husband entered the American Zone of Occupied Germany. Permission to so enter was granted to her by competent military authority. She was transported across the Atlantic Ocean on a vessel operated under the jurisdiction of the military authorities and without cost to herself. The orders for her transportation were issued by the military authorities and the said orders stated on their face that "travel herein authorized is necessary in the military service." An identification or "AGO" card, identical to that issued to persons in military uniform, was issued to her by the War Department acting through the Adjutant General's Office. Transportation from the port of disembarkation

was by train reserved exclusively for United States military personnel and was at government expense. Petitioner and her husband were granted facilities, accommodations and billets established for the United States military forces. Petitioner's home was requisitioned for military use and was furnished and maintained by competent U. S. military authorities. Petitioner was authorized to and did use the facilities of the United States Army established for persons in the military service of the United States and persons serving with and accompanying the said armed forces, i.e., United States Army commissaries, United States military hospitals, United States Army post exchanges, United States Army Officers' messes, United States Army garage facilities, United States Army rail, automobile, air and water transportation, United States Army recreation centers, United States Army clothing and general merchandising stores, United States Army scrip (a special currency made available only for those authorized to use it, including persons in the military service of the United States). Petitioner was subjected to certain limitations imposed on persons in the military service, such as the prohibition against entering places marked "off limits" to military personnel, etc. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States.

3. On October 20, 1949, while the petitioner was in the status described in the preceding paragraph and while residing in Buchschleg, Kreis Frankfort, in the American Zone of Occupied Germany, she was arrested by the Air Force military police and on October 21, 1949 charged with violation of Section 211 of the German Criminal Code before a tribunal which was then entitled "United States Military Government Court." A summons containing a copy of the charge and particulars was served on the petitioner personally on October 21, 1949. The said court was created pursuant to United

States Military Government Ordinance 31 on 18 August 1948 (and had been functioning since 27 October 1948), with a criminal procedure prescribed by Ordinance 32 of the same date.

4. Section 211 of the German Criminal Code reads as follows in English translation:

> *"Murder—Mord*
>
> "211. *(As in force prior to 4 September 1941).* Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.
>
> "211. *(As amended 4 September 1941, RGBI I, 549).* The murdered shall be punished by death.
>
> "A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);
>
> "For the satisfaction of sexual desire;
>
> "For cupidity (Habgier) or any other base motives;
>
> "In a treacherous or cruel manner or by means causing common danger, or
>
> "In order to make possible or to conceal another offense.
>
> "If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

5. On October 21, 1949 a preliminary hearing was held by the court which was continued until October 24. The petitioner and her counsel were present. At the conclusion of said hearing, the petitioner was ordered held for trial.

6. A copy of the charges (copy attached) was served on the accused on November 1, 1949. No further or other charges or particulars were filed against her.

7. On January 1, 1950, Ordinance 31 was amended, by Law #1 promulgated by the U. S. High Commissioner dated December 28, 1949, to change the name of the courts established thereunder from "United States Military Government Courts for Germany" to "United States Courts of the Allied High Commission for Germany." Petitioner was brought to trial before a court of said court system entitled "The United States Court of the Allied High Commission for Germany, Fourth Judicial District" on February 20, 1950. The court was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate, in accordance with the provisions of Article 13, Sections 1 and 2 of Ordinance 31. They were not nominated or appointed as district judge or magistrate by the President of the United States by or with the advice and consent of the Senate of the United States, nor did they purport to act as judges of any court established under Article III of the Constitution of the United States.

8. At the conclusion of the trial, the court adjudged the defendant guilty as charged. It concluded that paragraph 2 of Section 51 of the German Criminal Code applied, and therefore determined its sentence in accordance with Section 44 of the German Criminal Code. It sentenced the petitioner "to be confined in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct, for a term of confinement of fifteen years, beginning 20 October 1949."

9. The material portions of the sections of the German Criminal Code to which reference has just been made read, in English translation, as follows:

"51. (As amended 24 November 1933; RGBl. I, 995). An act does not constitute an offense if the actor at the time of the commission of the act was either unable to realize the forbidden nature of his act or unable to act in accordance with proper understanding because his consciousness was impaired (Bewusstseinsstorung) or because he has suffered either pathological mental derangement or mental infirmity.

"If the ability to realize the forbidden nature of the act, or the ability to act in accordance with its proper understanding, was considerably diminished due to one of the above stated reasons, the punishment may be reduced in accordance with the provisions for the punishment of attempt."

"44. (As amended 5 December 1939; RGBI I, 2378). An attempt at a major or minor crime may be punished more lightly than an accomplished crime.

"(As amended 29 May 1943, RGBI I, 341). If an accomplished major crime is punished by death or by confinement in a penitentiary for life, the attempt may be punished by confinement in a penitentiary but for not less than three years."

10. Thereafter the petitioner, in order to exhaust all remedies, appealed to the Court of Appeals of the United States Courts of the Allied High Commission for Germany, which court was composed of five United States civilians who had been appointed as justices of the Court of Appeals in accordance with the provision of Article 13, Sections 1 and 2, of Ordinance 31. After there had been oral arguments of both parties and after written briefs had been filed with the court by them, the court rendered a written opinion on 10 May 1950 affirming the judgment of the trial court; but by order modified that part of the judgment relating to commitment, because

of a directive issued by the Secretary of State, so as to read that she be committed "to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of fifteen (15) years from 20 October 1949." (A copy of the order is attached.)

11. Petitioner was returned to the United States and on May 20, 1950 delivered to the custody of the United States Marshal. She was taken to Alderson, West Virginia, where she has since been confined in the Federal Reformatory for Women.

12. United States Military Government in Germany was carried on under the Department of the Army until 21 September 1949. On that date the Occupation Statute for Western Germany, agreed to by the governments of the United States, the United Kingdom and France, was declared to be in force, thus putting into effect the Charter of the Allied High Commission, also agreed to by those governments. The Allied High Commission then came into existence and the Honorable John J. McCloy, who had been the United States Military Governor since early July, 1949 after General Lucius D. Clay had vacated that office, ceased to function as such and thereafter functioned as United States High Commissioner pursuant to Executive Order No. 10062. On that date also the Office of Military Government for Germany (the agency which had been administering military government) ceased to function except for certain liquidating operations and the Office of the United States High Commissioner for Germany became the United States agency in the American Zone of Occupied Germany through which the authority vested in the U. S. High Commissioner was exercised.

The Office of the United States High Commissioner and the High Commissioner himself have functioned since September 21, 1949 under the direction of the

Secretary of State. The Department of the Army has had no direct functional responsibility for the operations of that Office or of the High Commissioner since that date, although it has been furnishing certain logistic support for those operations.

13. The respondent herein named is the Warden of the Federal Reformatory for Women and is vested with power to take such action with respect to the petitioner as the Court may direct.

14. By agreeing to the above statement of facts, neither party concedes that all the facts agreed upon are material or necessary for the determination of this controversy. The parties stipulate that the Court may determine which of the facts are to be considered material, relevant and competent under the pleadings as framed. The parties further agree that they will supply the Court with any additional facts which in the Court's opinion are needed for determination of the controversy.

s/ DAYTON M. HARRINGTON
Attorney for Petitioner

s/ JMR
Attorney for Respondent

Court Exhibit 1—(continued)

UNITED STATES MILITARY GOVERNMENT
COURTS FOR GERMANY

CHARGE SHEET

UNITED STATES MILITARY GOVERNMENT

vs.

Yvette J. MADSEN — Frankfurt/Main

18 Buchweg, Buschlag — 31 October 1949

is hereby charged with the following offenses:

Charge:

Violation of Par. 211,
German Criminal Code

Particulars:

In that Yvette J. MADSEN did, at Buschlag, Germany, on or about 20 October, 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. MADSEN, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. MADSEN died on 20 October 1949.

I, the undersigned make oath that I have (investigated)* the matters set forth in the above charge (s) and particulars and that the same are true in fact, to the best of my knowledge and belief.

W. F. JOHNSON
WILLIAM F. JOHNSON
(SEAL) TITLE: District Attorney
4th Judicial District

Sworn to and subscribed before me, this 31 October day of 1949

T. T. MARYE
Title: District Judge

Copy of above served on accused 1 November 1949.

JOSEPH D. JORDAN

The above charges are set for Trial before the District Judge at Frankfurt/Main, Bockenheimer Anlage 45 Room 301 on November 10 1949 at 09:00 hours

s/ W. F. JOHNSON

*Strike out the words not applicable. Title:

NOTE: The official text of this form is in English. The German translation on the reverse side is for information only.

RIGHTS OF THE ACCUSED

Every accused before a United States Military Government Court shall be entitled:

(a) To have in advance of trial a copy of the charges upon which he is to be tried;

(b) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice.

(c) To consult a lawyer before trial, to the aid of counsel at every stage of the proceedings, and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court;

(d) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

(e) To bring with him to his trial such material witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

(f) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

(g) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted.

OMGUS 9-556 L Feb 49

Court Exhibit 1—(continued)

UNITED STATES COURTS OF THE ALLIED HIGH COMMISSION FOR GERMANY
COURT OF APPEALS

OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY vs. YVETTE J. MADSEN	Case No. 428 In the COURT OF APPEALS

ORDER

The Court having considered the above entitled case on appeal, for the reasons stated in the opinion delivered and ordered filed this date, holds that the judgment of the District Court of the Fourth Judicial District should be, and it is hereby, affirmed.

Whereas, however, the judgment of the District Court provided that the accused, Yvette J. Madsen, "be confined in the Federal Reformatory for Women, Alder-

son, West Virginia or elsewhere as the Secretary of the Army may direct, for a term of confinement of fifteen (15) years, beginning on 20 October, 1949", and, whereas, under a Directive of the Secretary of State, which is now in effect, the said accused should be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment, therefore, this Court deems it within its proper function to correct that error without further action of the trial court.

That part of the judgment of the District Court committing the said accused to "The Federal Reformatory for Women, Alderson, West Virginia or elsewhere as the Secretary of the Army may direct, is changed so that the said accused hereby is committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a term of fifteen (15) years from 20 October 1949.

It is ordered that the Clerk deliver a certified copy of this order and commitment to the Provost Marshal of the European Command, U. S. Army, or his authorized representative who is directed to deliver the said accused to the Department of Justice, Staten Island, New York, U.S.A., and that the copy serve as the Commitment of the accused.

Ordered at Nurnberg, Germany, this 12th day of May 1950.

A Certified True Copy:

s/ FLOYD W. KING
Acting Clerk

s/ WILLIAM CLARK
Chief Justice

s/ JUAN SEDILLO
Associate Justice

s/ H. LLOYD ERICSSON
Associate Justice

Court Exhibit 2

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

YVETTE J. MADSEN, *Petitioner*

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, *Respondent.*

Upon Habeas Corpus No. 1095

SUPPLEMENTAL AGREED STATEMENT OF FACTS

The following facts are agreed upon relative to the commitment of the petitioner at the Federal Reformatory for Women, Alderson, West Virginia:

On May 18, 1950, the Warden of the Reformatory received a copy of a letter dated May 15, 1950, written by James V. Bennett, Director, Bureau of Prisons, to Mr. W. Bruce Matthews, United States Marshal, Washington, D. C., reading as follows:

> "The Federal Reformatory for Women, Alderson, West Virginia, is designated as the place of confinement for Mrs. Yvette J. Madsen, who was sentenced to a term of 15 years by the United States Court for the Allied High Command for Germany.
>
> "We have been advised that Mrs. Madsen will be transported to Washington by the Air Force some time this week. The State Department will notify us as soon as they learn the definite arrival time and we will notify your office."

On May 20, 1950, the Warden received a telegram or teletype from the Assistant Director, Bureau of Prisons, advising that two girls were arriving the following day.

On May 21, 1950, W. Bruce Matthews, United States Marshal, Washington, D. C., by his deputy, Margaret E.

Ferris, delivered petitioner into the custody of the Warden of said Reformatory, at Alderson, West Virginia. At the same time, there was delivered by the Marshal to the Warden a certified copy of commitment order of the military tribunal which tried the petitioner in Germany, dated March 18, 1950, and a certified copy of the order of the Court of Appeals, United States Courts of the Allied High Commission for Germany, dated May 12, 1950, sustaining the conviction of petitioner and directing her to be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for a term of fifteen (15) years from 20 October, 1949.

There were no other papers received by the Warden of said Reformatory in connection with the commitment of petitioner.

Court Exhibit 2—(continued)

Form OMGUS—537
23 Feb 49)

UNITED STATES COURTS OF THE ALLIED HIGH COMMISSION FOR GERMANY

COMMITMENT OF FEMALE U. S. OCCUPATION PERSONNEL SENTENCED TO TERMS OF CONFINEMENT

OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY	No. D1 109
vs.	Fourth Judicial District
YVETTE J. MADSEN	—District Judge

To the Officer-in-Charge of: Federal Reformatory for Women, Alderson, West Virginia, or any other prison

to which the prisoner may hereafter be lawfully transferred:

Yvette J. Madsen has been convicted of the offense of Violation of Par. 211, German Criminal Code, in that she did, at Buschlag, Germany, on or about 20 October 1949, unlawfully, intentionally and with premeditation, in a treacherous manner, shoot one Andrew E. Madsen, a human being, in the body with a pistol, as a result of which the aforesaid Andrew E. Madsen, died on 20 October 1949, and has been sentenced by the Magistrate-District Court to be confined for a period of fifteen (15) years, the said sentence to commence on 20 October, 1949, and to be confined in such place as prescribed by Headquarters, European Command, pending final disposition of the case by the reviewing or appellate authority, and thereafter with respect to any unserved or unremitted portion of the sentence to be confined in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army shall direct.

You are hereby directed to receive the above named prisoner into your custody and detain her in accordance with the sentence so imposed or until further order of the Court, or other competent authority, and for so doing this shall be sufficient warrant.

Signed this 18th day of March, 1950

s/ JOHN J. SPEIGHT
Judge

s/ HERMAN ELEGANT
Judge

s/ FRED J. COHN
Presiding District Judge
Fourth Judicial District
APO 757, US Army

CERTIFIED TRUE COPY

s/ MANFRED GUGGENHEIM
Clerk of Court
US Courts of the Allied High
Commission for Germany
4th Judicial District.

Petitioner's Exhibit 1

Appendix V

CHARTER OF THE ALLIED HIGH COMMISSION FOR GERMANY

I

ESTABLISHMENT OF ALLIED HIGH COMMISSION

and

TRANSFER OF CONTROL

1. An Allied High Commission (hereinafter referred to as the High Commission) is hereby established for the exercise of supreme Allied authority in the Federal Republic of Germany. The High Commission shall be headed by three High Commissioners, one designated by each of the three powers signatory hereto.

2. As from the date of the entry into force of the Occupation Statute all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany, from whatever source derived and however exercised, will be transferred to the three High Commissioners respectively to be exercised in accordance with the provisions hereof and of the Occupation Statute.

3. The forces of occupation of the three powers in Germany shall remain stationed in their respective zones of occupation. Command of the forces of occupation in each zone and control of their related military establishments shall remain with the respective Commanders of the forces of occupation in such zone.

4. Legislation of the Occupation Authorities enacted before the effective date of the Occupation Statute shall remain in force until repealed or amended or otherwise replaced as provided in the Occupation Statute.

II

FUNCTIONS OF THE HIGH COMMISSION

1. The High Commission shall exercise control over the Federal Government and the Governments of its constituent Laender (States), as provided in the Occupation Statute. In the exercise of the powers reserved to the Occupation Authorities under said Statute, the High Commission shall reach its decisions in accordance with the provisions of the "Agreement as to Tripartite Controls" among the three powers dated April 8, 1949, and attached hereto and made part of this instrument as Annex A. These decisions shall constitute a joint exercise of the authority of all of the three High Commissioners.

2. The High Commission shall act only through the Federal or appropriate Land (State) Government except where direct action or legislation by the High Commission is necessary or appropriate for the due exercise of any of the powers reserved to the Occupation Authorities under the Occupation Statute.

3. The Headquarters of the High Commission shall be at the seat of the German Federal Government which together with a surrounding area to be defined will constitute a special area directly under the High Commis-

sion and excluded from any individual zone of occupation. The necessary special arrangements in connection with the definition and administration of this area in as far as they concern the Allies will be determined subsequently by the High Commission.

III

ORGANIZATION OF THE HIGH COMMISSION

1. The organization of the High Commission at its headquarters shall be tripartite in character and shall consist of:

a. an Allied Council (hereinafter referred to as "the Council") composed of the three High Commissioners. Each High Commissioner shall nominate a Deputy or permanent representative who will take his place on the Council in his absence. The Deputies or permanent representatives of the respective High Commissioners acting together may function as an Executive Committee of the Council if the Council so decides;

b. such committees or bodies as the Council may from time to time establish. These committees and bodies shall advise the Council in their respective spheres and shall exercise such executive functions as the Council may delegate to them. The number, functions, and organization of such committees or bodies may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Subject to the above, in order to ensure continuity of operation, the Council initially shall be assisted by committees, respectively for political affairs, foreign trade and exchange, finance, economics, law, and by the Military Security Board. Each committee shall be assisted by such associated staff as it may require and as the Council approve;

c. an Allied General Secretariat.

2. The Council.

The Council shall constitute the supreme authority of the High Commission. The Council shall meet as frequently as it considers necessary and at any time upon the request of any of its members. The chairmanship of the Council and its various committees shall be held in monthly rotation by each of its members. The Council shall fix the time and place of its meetings and shall establish appropriate rules and procedures for the conduct of its business. Decisions of the Council shall be reached in accordance with Annex A hereof.

3. Committees.

The composition of each committee and its terms of reference shall be fixed by the Council. Initially, such committees, together with their respective terms of reference, shall be as follows:

a. the Political Affairs Committee, consisting of the Political Advisers to the respective High Commissioners, will be concerned with all political and foreign affairs of the German Federal and Land Governments coming within the competence of the Council;

b. a Foreign Trade and Exchange Committee, consisting of the respective Economic and Finance Advisers of each of the High Commissioners.

(i) the committee shall observe the economic, financial, and foreign trade policies of the German authorities and shall advise the Council if such policies or any action taken or proposed to be taken pursuant thereto is likely to have such adverse effect on the foreign trade or foreign exchange resources of the German Government as is likely to increase its need for external assistance;

(ii) the members of the committee shall automatically be members of the Board of Directors of the

Joint Export-Import Agency (hereinafter referred to as "JEIA") and in conjunction with the other directors shall be charged with the orderly liquidation of JEIA at the earliest practicable date. The committee shall assume any control functions presently exercised by JEIA as may warrant retention when the liquidation of JEIA is completed;

(iii) it is understood that the German Federal Republic will become a party to the convention for European Economic Cooperation and will execute a bilateral agreement with the Government of the United States. It is further understood that thereafter the functions of the High Commission in respect of the matters referred to in (i) will be appropriately modified;

c. the Economics Committee, consisting of the Economics Advisers to the respective High Commissioners, shall observe the general economic policies of the German authorities and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. The Committee shall advise the Council on all matters relating to the decartelization and deconcentration of German industry;

d. the Finance Committee, consisting of the Finance Advisers to the respective High Commissioners, shall observe the general financial policies of the German authorities, and shall advise the Council as to the exercise of its powers in this connection reserved under the Occupation Statute. To the extent necessary within the limits of the provisions of the Occupation Statute, the Finance Committee shall succeed to and shall assume the functions heretofore exercised by the Allied Bank Commission.

e. the Law Committee, consisting of the Legal Advisers to the respective High Commissioners, shall ad-

vise the Council and its committees on all legal and judicial affairs arising out of the work of the High Commission;

f. the Military Security Board shall deal with all matters of demilitarization, disarmament, industrial prohibitions and limitations, and scientific research in accordance with its existing terms of reference.

4. Committee Staffs and Subordinate Groups.

a. within numerical limitations established by the Council, each of the committees designated pursuant to paragraph 3 of this Article III shall establish such tripartite subordinate committees or other groups as may be necessary to the performance of its functions and as the Council may approve;

b. except as specifically otherwise provided in subparagraph c of this paragraph 4, personnel for such subordinate committees or groups shall be appointed by each of the High Commissioners on a basis of parity among the three Allied nations. They may include military personnel. The number, functions, and organization of such subordinate committees or groups may be changed, adjusted, or eliminated entirely by the Council in the light of experience. Each subordinate committee or group shall be answerable to the committee responsible for its creation and shall report to the Council through such committee. Each subordinate agency shall be physically located at the headquarters of the High Commission except as may be otherwise determined by the Council;

c. the subordinate committees and groups established pursuant to subparagraph a of this paragraph 4 shall include:

(i) Joint Export-Import Agency which, until liquidated as provided in subparagraph b of paragraph 3 hereof, shall function under its existing

terms of reference with an integrated staff and shall report to the Committee on Foreign Trade and Exchange through its Director General who together with the deputy Directors General shall be members of the Board of Directors of JEIA;

(ii) the Decartelization and Industrial Deconcentration Group, the Coal Control Group, and the Steel Control Group, all of which shall report through the Economics Committee;

(iii) the Combined Travel Board which shall report through the Political Affairs Committee;

(iv) Civil Aviation Board which shall report as determined by the Council;

(v) an Information and Cultural Affairs Sub-Committee which shall report through the Political Affairs Committee;

(vi) a Sub-Committee on Foreign Interests which shall report as determined by the Council.

5. Allied General Secretariat.

The High Commission shall be served by a Tripartite General Secretariat. The Secretariat will receive and dispatch all communications to or from the High Commission, prepare the agenda and materials for the meetings of the Council, and shall keep the minutes of their meetings. The Secretariat or its appropriate branches shall act as the channel of communication between the High Commission and the agencies of the Federal Government, and between the Council and the several Land Commissioners with respect to matters affecting said Land Governments. The Secretariat shall maintain the records of the High Commission and be responsible for such other tasks as the Council may decide.

IV

LAND COMMISSIONERS

1. All powers of the High Commission shall be uniformly exercised in the constituent Laender (States) of the Federal Republic, in accordance with tripartite policies and the directions of the Council.

2. To achieve uniformity in the exercise of its powers, the High Commission shall be represented at the seat of government of each of the constituent Laender by an Allied Land (State) Commissioner who shall be solely responsible to the Council for ensuring due compliance on the part of the Land authorities with the Council's decisions and directives. The Land Commissioner shall report and be solely responsible to the Council for all matters of tripartite concern in the Land and shall be the exclusive channel of communication and liaison between the Council and the Land Government with respect to such matters.

3. In particular each Land Commissioner shall be responsible to the Council for:

(a) initial consideration and prompt transmittal to the Council of Land legislation, together with his recommendations thereon;

(b) observing and ensuring due compliance on the part of the Land Government with the provisions of the Federal and Land Constitutions, the Occupation Statute, and the laws of the Occupation Authorities in force;

(c) providing information as required by the Military Security Board and giving all necessary assistance to the inspectorate of the Military Security Board and such other bodies as may be authorized by the Council;

(d) the preparation of such periodic or special reports as the Council may request.

4. Each Land Commissioner and the members of his staff shall be nationals of the power in whose zone the Land is situated, and shall be appointed by and administratively responsible to the High Commissioner designated by such power. Each Land Commissioner shall be accountable exclusively to his High Commissioner and shall be his channel of communication and liaison with the Land Government with respect to:

(a) all matters which are listed in Article V, paragraph 2;

(b) conduct of all relationships between the forces of occupation stationed in the Land and the governmental agencies thereof except to the extent that direct communications and relations may be authorized by him.

5. Each High Commissioner shall designate an observer together with a small personal staff to be agreed in each case by the High Commissioners concerned, to each of the Land Commissioners outside of his own zone for purposes of consultation and information.

V

INDIVIDUAL RESPONSIBILITIES OF THE HIGH COMMISSIONERS

1. Each High Commissioner shall maintain at the seat of government of each of the Laender in his zone a Land Commissioner with the minimum staff and facilities required for the purposes set forth in Articles IV and V hereof. He shall ensure the due implementation by each of said Land Commissioners of the decisions and directions of the Council. He shall also ensure that all powers of the High Commission are uniformly exercised within

said Laender in accordance with tripartite policy and the decisions of the Council.

2. Each High Commissioner shall be responsible to his Government with respect to the Laender of his zone for the matters in fields reserved to Occupation Authorities listed below. Nevertheless so far as possible, he shall coordinate the general policies which he may pursue in these fields with those of the other High Commissioners and exercise these powers in accordance with such tripartite legislation or policies as the Council may adopt:

(a) maintenance of law and order if the responsible German authorities are unable to do so;

(b) ensuring the protection, prestige, security and immunities of the Allied forces of occupation; of the Allied Occupation Authorities, their dependents, employees and official representatives;

(c) the delivery of reparations and restitutable property;

(d) care and administration of displaced persons;

(e) the disposition of war criminals;

(f) administration of justice in cases falling within the jurisdiction of Allied Courts;

(g) control of the care and treatment in German prisons of persons charged before or sentenced by the Courts or tribunals of the Occupation Authorities, over the carrying out of sentences imposed on them and over questions of amnesty, pardon or release in relation to them.

3. Each High Commissioner shall be individually responsible for the formulation annually, in accordance with tripartite policies and criteria, of a budget of occupation costs and other requirements within his zone. Such budget shall be formulated and submitted to the

Council, on a date to be determined by it, for consideration and approval by the Council and for consolidation in a total budget of the Occupation Authorities for transmission to the German Government. Each High Commissioner shall be responsible to the Council for control of the approved budget for his zone in accordance with accounting standards and procedures established by the Council.

VI

DECISIONS OF THE COUNCIL

1. Formal decisions and directions of the Council affecting the Federal Government or any agency thereof shall be in writing and shall be communicated to the Chancellor by or on behalf of the Council.

2. Formal communications involving matters of lesser import or of a routine character may be addressed to the Minister concerned by the appropriate organ of the Council.

3. Formal decisions or directions of the Council affecting a Land Government or any agency thereof shall be in writing and shall be communicated to its Minister President through the Land Commissioner, in the name of the Council.

4. Formal decisions of the Council shall be recorded in an official gazette maintained by the High Commission at the Allied seat of control in Germany which shall be published in the English, French, and German languages. Publication of any such decision in the official gazette of the High Commission shall be conclusive evidence that the recorded action or decision was taken pursuant to the powers vested in the Occupation Authorities under the Occupation Statute.

VII

INTERNATIONAL AUTHORITY FOR THE RUHR

The High Commission shall take all necessary steps to give effect to Article 22 of the Agreement establishing the International Authority for the Ruhr of April 28, 1949.

VIII

FOREIGN MISSIONS IN GERMANY

The necessary liaison with the governments of other nations especially interested will be ensured by the appointment of such governments of appropriate missions to the Council of the High Commission having access, by procedures to be determined. to its subordinate bodies and to the German Government.

IX

UNITED NATIONS ORGANIZATIONS IN GERMANY

United Nations organizations and specialized agencies may operate in the Federal Republic of Germany on such terms as may be agreed by the Council.

X

OFFICIAL LANGUAGES

The official languages of the High Commission shall be English and French. Authoritative German texts of documents shall be provided as necessary.

XI

IN WITNESS WHEREOF the foregoing agreement has been duly executed by the respective representatives thereunto duly authorized of the Governments of the United Kingdom of Great Britain, the United States of America, and the Republic of France, in triplicate in the

French and English languages, each text being equally authentic and shall come into effect on the date of the entry into force of the Occupation Statute.

Paris
June 16, 1949

Petitioner's Exhibit 2

DEPARTMENT OF STATE

FOR THE PRESS APRIL 8, 1949
No. 226

FOR RELEASE AT 1:40 P. M., E.S.T., FRIDAY, APRIL 8, 1949. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM OR USED IN ANY WAY.

COMMUNIQUE

The Foreign Ministers of the United States, United Kingdom, and France have discussed in Washington the whole range of issues now pending in connection with Germany and have arrived at complete agreement.

The text of an Occupation Statute in a new and simpler form has been approved and is being transmitted to the German Parliamentary Council at Bonn. Agreement was reached on the basic principles to govern the exercise of Allied powers and responsibilities and also the tripartite Allied control machinery. The Foreign Ministers confirmed and approved agreements on the subject of plant dismantling, prohibited and restricted industries, and the establishment of an International Ruhr Authority, all of which were recently negotiated in London.

The Occupation Statute will define the powers to be retained by the occupation authorities upon the establishment of the German Federal Republic and set forth basic procedures for the operation of Allied supervision. Subject only to the limitations of the Statute, the Ger-

man Federal State, and the participating Laender will have full legislative, executive and judicial powers, in accordance with the Basic Law and with their respective constitutions. The Statute aims to permit the German people to exercise democratic self-government. Provision is made for a review of the terms of the Statute after a year in force.

With the establishment of the German Federal Republic there will be a marked change in the organization to carry out occupation responsibilities. Military Government as such will be terminated and the functions of the Allied authorities will become mainly supervisory. Each of the Allied establishments in Germany will come under the direction of a High Commissioner, aside from the occupation forces which will remain headed by Military Commanders. The three High Commissioners together will constitute an allied High Commission which will be the supreme Allied agency of control. In order to permit the German Federal Republic to exercise increased responsibility for domestic affairs and to reduce the burden of occupation costs, staff personnel shall be kept to a minimum.

The German government authorities will be at liberty to take administrative and legislative action and such action will have validity if not disapproved by Allied authorities. There will be certain limited fields in which the Allies will reserve the right to take direct action themselves, or to direct German authorities to take action. However, these fields will be limited, and aside from security matters the exercise of direct powers by the Allies is regarded in many instances as self-liquidating in nature.

It was agreed that a major objective of the three Allied Governments was to encourage and facilitate the closest integration, on a mutually beneficial basis, of the German people under a democratic federal state within the frame-

work of a European association. In this connection it is understood that the German Federal Republic will negotiate a separate bilateral ECA agreement with the United States and should participate as a full member in the Organization for European Economic Cooperation, thus becoming a responsible partner in the European Recovery Program.

Petitioner's Exhibit 3

IMMEDIATE RELEASE MAY 18, 1949

The President today announced that he is sending to Senate the nomination of Mr. John J. McCloy to be United States High Commissioner for Germany and Chief of Mission. Tentative plans are that Mr. McCloy, upon confirmation, will take up his duties in Germany within the near future.

In sending the nomination of Mr. McCloy to the Senate the President indicated his great reluctance to ask Mr. McCloy to relinquish his position with the World Bank because of the importance he attaches to the role the Bank can play in the economic reconstruction and development of the world. He did so only after being satisfied that a successor thoroughly equipped to carry on the work of the Bank was available for the Presidency of the Bank.

Mr. McCloy's resignation as President of the World Bank for Reconstruction and Development will become effective not later than July 1, 1949.

One of the matters which Mr. McCloy will take under early advisement will be the development of plans for the transfer of responsibility for non-military aspects of the United States occupation of Germany from the Department of the Army to the Department of State and the Economic Cooperation Administration. This transfer will

take place on or about the time of the establishment o the German Provisional Government.

The appointment of Mr. McCloy as United States Hig Commissioner for Germany grows out of the Washingto meeting of the Foreign Ministers of the United Kingdom France and the Secretary of State, at which agreemen was reached on the establishment of Tripartite Contro Machinery for West Germany.

As United States High Commissioner, Mr. McCloy wi be the supreme United States authority in Germany Subject to consultation with and ultimate direction b the President, he will be under the immediate super vision and direction of the Secretary of State. He wi have the authority to exercise all the governmental func tions of the United States in Germany, other than th Command of the United States Occupation Forces. H will represent the United States on the Allied High Com mission for Germany (United States-United Kingdom France) when established and will exercise the appro priate functions of a Chief of Mission, Class One, withi the meaning of the Foreign Service Act of August 1 1946.

Subject to consultation with and ultimate directio by the President, Mr. McCloy will be the representativ of the Economic Cooperation Administration in all it relations and actions with respect to Germany. As re gards these functions he will be under the immediat supervision and direction of the Administrator for Eco nomic Cooperation (Mr. Hoffman) and the coordinatio of the United States Special Representative in Europ (Mr. Harriman). Mr. McCloy will be assisted by a Chie of Special Mission to be appointed by Mr. Hoffman, wh will have the rank of Minister and act under the imm diate supervision and direction of the United States Hig Commissioner.

On military matters, the Military Commander will continue to receive instructions directly from the Joint Chiefs of Staff. However, the High Commissioner will be authorized to direct the United States Commanding General to intervene for the maintenance of law and order and to take such other action as is required to support United States policy in Germany. During the period prior to the transfer of military government responsibility from the Secretary of Defense to the Secretary of State, the High Commissioner will also be the Military Governor of the United States Zone in Germany. In this capacity he will be under the immediate supervision of the Secretary of Defense, subject of course to consultation with and ultimate direction by the President.

It is contemplated that to the maximum extent practicable, existing personnel of OMGUS in Germany and of the Army Department in Washington will be utilized in staffing the organization of the High Commissioner, including the ECA Mission in Germany; and the appropriate additional Washington facilities of the Department of State and ECA.

Mr. McCloy was born in Philadelphia on March 31, 1895. He attended Peddie School and was graduated (A.B.) from Amherst College in 1916 and from Harvard (LL.B.) in 1921. Admitted to the New York Bar in 1921, he became subsequently a partner of Cravath, de Gersdorff, Swaine and Wood, from which he resigned in 1940 to assist Secretary of War Henry L. Stimson. He was also Chairman of the Combined Civil Affairs Committee of the Combined Chiefs of Staff. Mr. McCloy was awarded the Distinguished Service Medal by President Truman for his war work and was honored by France with the rank of Grand officer of the Legion of Honor.

In 1941 he was appointed the Assistant Secretary of War, in which capacity he served until 1945. He resigned from that position to return to the practice of law and

became a member of the firm of Milbank, Tweed, Hope, Hadley and McCloy. He became President and Chairman of the Board of the International Bank for Reconstruction and Development on March 17, 1947.

Mr. McCloy served abroad in the First World War as an artillery captain in the American Expeditionary Forces. On April 25, 1930 Mr. McCloy was married to Ellen Zinsser. They have two children, John, aged 11, and Ellen, aged 7.

Petitioner's Exhibit 3

Appendix I

EXECUTIVE ORDER
10062

Establishing the Position of United States High Commissioner for Germany

By virtue of the authority vested in me by the Constitution and the Statutes, including the Foreign Service Act of 1946 (60 Stat. 999), and as President of the United States and Commander in Chief of the Armed Forces of the United States, it is ordered as follows:

1. There is hereby established the position of United States High Commissioner for Germany, which position shall be that of Chief of Mission, Class 1, in accordance with the provisions of the said Foreign Service Act of 1946.

2. The United States High Commissioner for Germany, hereinafter referred to as the High Commissioner, shall be the supreme United States authority in Germany. The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the

governmental functions of the United States in Germany (other than the command of troops), including representation of the United States on the Allied High Commission for Germany when established, and the exercise of appropriate functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946.

3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements.

THE WHITE HOUSE
June 6, 1949

Harry S. Truman

Petitioner's Exhibit 4

DEPARTMENT OF STATE

FOR THE PRESS SEPTEMBER 21, 1949
NO. 729

STATEMENT BY ACTING SECRETARY OF STATE JAMES E. WEBB

Today marks the beginning of a new phase in the occupation of Germany. Having freely elected a Parliament and selected a President and a cabinet under the terms of the Basic Law drafted at Bonn and ratified by the German states, the people of two-thirds of Germany are regaining today a large measure of self-government under the Occupation Statute and the Allied High Commission. It is our regret that not all the German people are free to join in the re-establishment of their self-government. It is through no wish or act of ours that the Germans in the Eastern Zone are not yet able to play a role in the new Germany which is about to emerge. The door is open to them, however, and we expect that the day will come when they will be able to enter on truly democratic terms.

The new state of affairs in Germany will present a challenge equally to the Germans and to the United States and the other Occupation Powers. For us it means we have entered that delicate stage in which we relinquish our close grasp of the administration of government and content ourselves for the most part with observing events and giving advice, encouragement and economic support. In a limited sphere, of course, we retain direct control, and sufficient power is reserved to safeguard the chief purposes of the occupation. We are fully prepared to use that power, if need be, because we are resolved to prevent a return to power of the Nazis. But we are likewise resolved to use our power sparingly and with restraint and to proceed towards the re-estab-

lishment of a normal situation as rapidly as possible. In this tremendous task of reintegrating Germany into the family of democratic nations, success is dependent upon sympathetic cooperation and support from the American people.

The speed with which a return to normality can be achieved will depend largely on the German people themselves. This is why we say that the Germans face a challenge and an opportunity in the new state of affairs. The challenge is to rehabilitate themselves as a nation and to show by their acts that they merit the confidence we are reposing in them. The opportunity is for them to play that constructive role in the development of the new Europe which their talents, their position and their resources should enable them to play. Through the painstaking labors of the occupation powers during the past four years, during which the American contribution has been of great importance, a solid economic and political foundation has been laid in the Western Zones. It is for the Germans themselves now to build a solid superstructure.

We in the United States wish the German people success in their endeavors to achieve this goal.

Petitioner's Exhibit 5

DEPARTMENT OF STATE

FOR THE PRESS APRIL 13, 1949
NO. 247

OCCUPATION STATUTE AND THE BASIC LAW

At his press conference today Secretary Acheson made the following statement:

Our information indicates that the preliminary German reaction to the Occupation Statute has not been un-

favorable. We expect that there will be increased understanding as the German political leaders and public have a chance to examine the background against which the Washington agreements were made and the purpose they are meant to serve.

The Occupation Statute sets forth the maximum powers which the Allied authorities mean to reserve. The key issue for the future will be the manner and extent to which the Allied authorities will exercise their powers. In this connection, I should like to point out that the three Governments had in mind establishing a practicable basis of cooperation with the future Federal German Government and declared it to be a major objective to facilitate the closest integration of the German people under their own government within the framework of European association.

I have noted the fears expressed that the occupying countries would use their powers to suppress future German industrial competition. This is a baseless assumption, since it has always been our aim to make Germany self-sufficient to the greatest possible degree in order to reduce the need for outside assistance.

The retention of control over research is a justifiable adjunct of continued German demilitarization and this is the context in which the pertinent provision of the occupation statute was framed.

As regards control over foreign trade, this is a protection of direct benefit to the German administration itself, since we must assure ourselves that the funds we are supplying are properly used and are not squandered. In the meantime we will, of course, permit and encourage the Germans to develop their own foreign trade resources so that they themselves may contribute as far as possible to their own support and to the production of goods for the benefit of Europe as a whole.

With respect to the Basic Law, certain features of which are still under discussion, our interest is that a solution will be found preserving the federal character of the government which the Germans have been authorized to set up and we hope that early agreement can be reached on this issue.

Petitioner's Exhibit 5

DEPARTMENT OF STATE

FOR THE PRESS APRIL 25, 1949
No. 287

FOR RELEASE AT 10:00 A. M., E.D.T., TUESDAY, APRIL 26, 1949. NOT TO BE PREVIOUSLY PUBLISHED, QUOTED FROM OR USED IN ANY WAY.

The Department of State today made public the text of the agreement reached in Washington on April 8, 1949, between the Governments of France, the United Kingdom, and the United States on the basic principles for the merger of the three western German zones of occupation. The purpose of this agreement is to define the organization and procedures through which the powers of the occupying governments will be exercised after the establishment of a provisional German government. The agreement provides for a High Commission, to be composed of a High Commissioner for each of the occupying governments, and it outlines the manner in which the Commissioners will vote and reach their decisions. The nature and extent of the powers to be exercised by the occupying governments have been fully set out in the occupation statute, which has already been released for publication (Press Release No. 235, April 8, 1949).

The provisions of this agreement as to tripartite controls will be applied so far as practical to Berlin.

The three governments also agreed to and recorded in their minutes the principles according to which their powers and responsibilities will be exercised after the establishment of a German Federal Republic. While the occupying governments will retain supreme authority, it is intended that military government will be terminated and that the function of the occupation officials will be mainly supervisory. The German authorities will be free to take administrative or legislative action, and this action will be valid unless it is vetoed by allied authority. The fields in which the occupation authorities reserve the right to take direct action themselves including the issuance of orders to German federal and local officials, will be restricted to a minimum, and it is expected that, with the exception of security questions the exercise of direct powers will be of a temporary and self-liquidating nature. After the German Federal Republic has been established, the Economic Cooperation Administration will assume the responsibility for supervising the use of funds made available by the United States Government to the German economy for purposes of relief and recovery. It is envisaged that the German Federal Republic will become a party to the Convention for European Economic Cooperation and will also conclude a bilateral agreement with the Government of the United States. When the German Republic has been established and military government has been brought to an end, the strictly military functions of the occupation authorities will be exercised by a Commander-in-Chief, and all other functions by a High Commissioner, who will direct each of the Allied establishments in Germany other than the occupation forces. It is intended that the size of the staffs to be maintained in Germany will be kept to a minimum. A major objective of the three Allied Governments is to bring about the closest integration, on a mutually beneficial basis, of the German people under a democratic federal state within the framework of a European association.

Petitioner's Exhibit 6

LAW NO. 25

APPLICATION OF PENAL PROVISIONS IN OCCUPATION LEGISLATION

The Council of the Allied High Commission enacts as follows:

In the absence of any provision to the contrary, provisions of a penal character in any legislation of the Allied High Commission or of a High Commissioner enacted on or after 21 September 1949 shall not apply to:

(a) the Occupation Authorities;

(b) members of the Occupation Forces;

(c) nationals of the Occupying Powers, civilian or military, who are serving with the Occupation Authorities or Forces;

(d) members of the families of, and nationals of the Occupying Powers in the service of, the persons referred to in paragraphs (a), (b) and (c) of this Article.

Done at
BONN, Petersburg, on 4 May 1950.

JOHN J. McCLOY
U. S. High Commissioner
for Germany

A. FRANCOIS-PONCET
French High Commissioner
for Germany

B. H. ROBERTSON
U. K. High Commissioner
for Germany

Petitioner's Exhibit 8

MAIL TO ALDERSON

RECEIVED
May 18, 1950
Alderson, W. Va.

NOTED
WARDEN

May 15, 1950

Mr. W. Bruce Matthews
United States Marshal
Washington, D. C.

Dear Marshal Matthews:

The Federal Reformatory for Women, Alderson, West Virginia, is designated as the place of confinement for Mrs. Yvette J. Madsen, who was sentenced to a term of 15 years by the United States Court for the Allied High Command for Germany.

We have been advised that Mrs. Madsen will be transported to Washington by the Air Force some time this week. The State Department will notify us as soon as they learn the definite arrival time and we will notify your office.

Sincerely yours,

By direction of the Attorney General
JAMES V. BENNETT
Director, Bureau of Prisons

FL:hd

Petitioner's Exhibit 10

UNITED STATES MILITARY GOVERNMENT
COURTS FOR GERMANY
FOURTH JUDICIAL DISTRICT
Frankfurt/Main

In District Court
Frankfurt/Germany

UNITED STATES MILITARY GOVERNMENT
vs. ORDER DESIGNATING COURT
YVETTE J. MADSEN, *Defendant*

Under the authority vested in me I hereby designate

JOHN J. SPEICHT, District Judge

HERMAN ELEGANT, Senior Magistrate

and myself as a three judge panel to try the above styled cause.

DONE AND ORDERED at FRANKFURT, GERMANY on this the twenty-eighth day of November AD 1949

s/ Fred J. Cohn
t/ FRED J. CONN
Chief Presiding District Judge

CERTIFIED TRUE COPY

Manfred Guggenheim
Clerk of Court

Respondent's Exihibit 1

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO. 1 21 September 1949

ESTABLISHMENT OF THE OFFICE OF THE U. S. HIGH COMMISSIONER FOR GERMANY

1. Effective 21 September 1949, in accordance with the provisions of Executive Order No. 10062, the authority residing in the U. S. Military Governor and the Office of Military Government for Germany (U. S.) for the governmental functions of the U. S. in Germany is as-

sumed fully and exclusively by the U. S. High Commissioner for Germany. All powers vested in the United States Military Governor including those vested under all international agreements, are transferred to the U. S. High Commissioner for Germany.

2. The Office of the U. S. High Commissioner for Germany is hereby established as the agency through which the authority vested in the U. S. High Commissioner shall be exercised. Its organization shall be as shown in the attached charts, and its functions shall be assigned among its constituent elements as set forth in separate issuances, effective this date.

3. As provided in Executive Order 10063, the undersigned, as U. S. High Commissioner for Germany, shall also be ECA Representative for Germany and shall be assisted by the Chief, ECA Special Mission to Germany, who shall also be Director, Office of Economic Affairs in the Office of the U. S. High Commissioner for Germany.

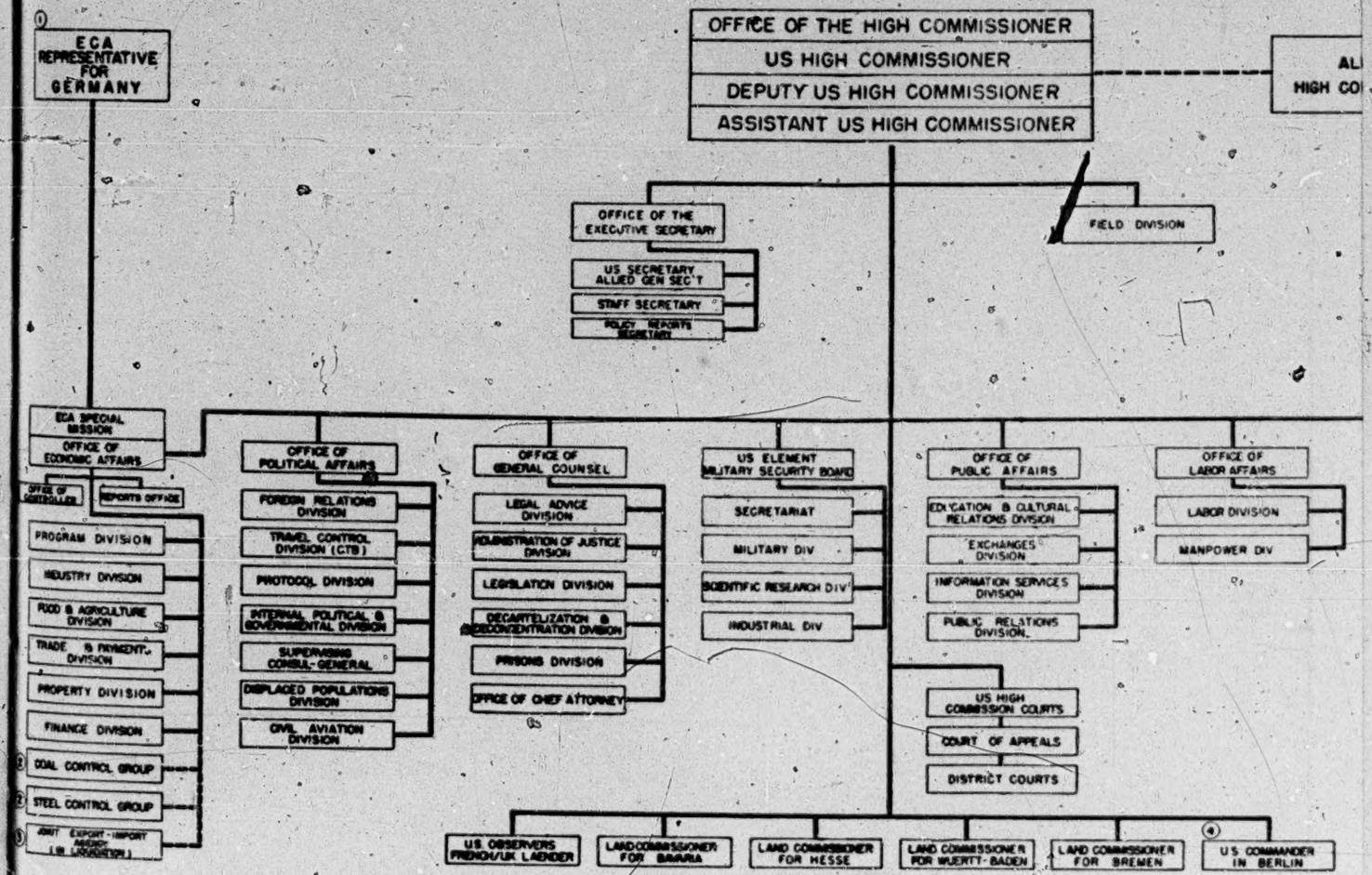
4. Transfer of funds, records, supplies and equipment from the Office of Military Government for Germany (U. S.) and appointment of personnel to the Office of the U. S. High Commissioner for Germany shall be accomplished as appropriate and are not effected by the terms of this announcement.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Attachments: 3 Charts

1. Office of the U. S. High Commissioner for Germany
2. Office of Land Commissioner (prototype)
3. Berlin Element, Office of the U. S. High Commissioner for Germany.

ORGANIZATION CHART
OFFICE OF THE
US HIGH COMMISSIONER FOR GERMANY



(1) ECA REPRESENTATIVE FOR GERMANY - BY EXECUTIVE ORDER, MR JOHN J McCLOY, THE US HIGH COMMISSIONER FOR GERMANY, ALSO SERVES AS ECA REPRESENTATIVE FOR GERMANY UNDER THE IMMEDIATE SUPERVISION OF THE ADMINISTRATOR FOR ECONOMIC COOPERATION AND IN COORDINATION WITH THE US SPECIAL REPRESENTATIVE FOR EUROPE ON PROJECT, HOWEVER, TO CONSULTATION WITH AND ULTIMATE DIRECTION BY THE PRESIDENT.)

(2) US ELEMENTS, COAL CONTROL GROUP AND STEEL CONTROL GROUP, RECEIVE POLICY GUIDANCE FROM DIRECTOR OF ECONOMIC AFFAIRS, FOR TRANSITIVE ACTIVITIES. THE GROUPS ARE RESPONSIBLE TO THE ECONOMICS COMMITTEE, ALLIED HIGH COMMISSION.

(3) US ELEMENT RECEIVES POLICY GUIDANCE FROM DIRECTOR ECONOMIC AFFAIRS; AGENCY IS ADMINISTRATIVELY RESPONSIBLE TO FOREIGN TRADE AND EXCHANGE COMMITTEE, ALLIED HIGH COMMISSION, DURING LIQUIDATION.

(4) THE US COMMANDER, BERLIN SERVES AS THE REPRESENTATIVE IN BERLIN OF THE US HIGH COMMISSIONER FOR GERMANY, FOR MILITARY MATTERS HE REPORTS TO THE COMMANDER-IN-CHIEF, EUROPEAN COMMAND

Respondent's Exhibit 2

EXTRACT COPY

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO. 5 21 September 1949

ORGANIZATION AND FUNCTIONS OF THE UNITED STATES COURTS FOR GERMANY

I. PURPOSE. The functions and organization of the United States Courts for Germany, as established by Staff Announcement No. 1, are defined in the following paragraphs.

II. GENERAL STATEMENT OF FUNCTIONS.

1. The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Government Ordinance No. 31) form an independent judicial unit responsible directly to the United States High Commissioner. The integrated system provides for district judges and magistrates at the district court level and for a Chief Judge and associate judges of the Court of Appeals.

2. The United States Courts for Germany shall exercise the review functions set forth in Article 69 of Military Government Law No. 59.

3. For certain purposes, such as the selection of personnel, the planning for personnel requirements, and the submission of recommendations regarding the revision of legislation, the United States Courts for Germany function in coordination with the Office of General Counsel.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Respondent's Exhibit 3

EXTRACT COPY

OFFICE OF THE U. S. HIGH COMMISSIONER
FOR GERMANY
APO 757

STAFF ANNOUNCEMENT

NO: 6 21 September 1949

ORGANIZATION AND FUNCTIONS OF THE OFFICE OF GENERAL COUNSEL

I. PURPOSE. The functions and organization of the Office of General Counsel, established by Staff Announcement No. 1, are defined in the following paragraphs.

II. GENERAL STATEMENT OF FUNCTIONS.

1. . . . . .

2. The Office of General Counsel is composed of six Divisions and Offices under the direction of the General Counsel for the discharge of the foregoing responsibilities. The specific functions of each such Division and Office are hereinafter set forth.

* * * *

VI. OFFICE OF THE CHIEF ATTORNEY.

1. Through the respective District Attorneys, prepares and prosecutes all cases before the respective District Courts of the United States Courts for Germany.

2. Prepares and prosecutes all cases appealed to the Court of Appeals of such courts.

JOHN J. MCCLOY
U. S. High Commissioner
for Germany

Respondent's Exhibit 4

EXTRACT COPY

Headquarters, European Command, Berlin, Office of the Commander-in-Chief, APO 742, US Army, 11 December 1948

TO: Chief Attorney, United States Military Government Courts for Germany, APO 696-A, US Army

Authorization is hereby given for trial of any dependent of a member of the United States Armed Forces or of any dependent of a civilian employee of the Department of the Army for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters has directed trial by Court Martial.

BY COMMAND OF GENERAL CLAY:

G. H. GARDE
Lieutenant Colonel, AGD
Assistant Adjutant General

2 Incls n/c
Telephone BERLIN 42456

EXCERPT FROM REPORTER'S TRANSCRIPT OF PROCEEDINGS

(R. 71-74)

MR. THOMPSON: Now, Your Honor, there are certain documents which we would like to have entered in the case:

We would like to show the file is before the Court, Your Honor, for one thing.

I believe it is a customary requirement, in habeas corpus proceedings for the proceedings in the Court

which tried the petitioner to be filed, either with the petition or with the answer or return. That was not done in this case heretofore because the record was in Germany and it took some time to get the record certified and get it here.

THE COURT: I think it depends, Mr. Thompson, on whether or not there has been an allegation, by any denial of any constitutional right, which is apparent in these proceedings.

Is there any such allegation?

MR. THOMPSON: Your Honor, I don't understand that there is any.

We have the record here.

It is somewhat voluminous. I hesitate to encumber the record with it, but we do have it here if anyone wishes it to be filed: the record in the lower Court, I suppose you call it, and appeal to the Appellate Court, set up in connection with this Military Court.

THE COURT: If any of these proceedings are drawn in question, either by the pleadings, or argument, or testimony, then the Court will permit the proceedings to be made a matter of record; otherwise, it seems to me it would simply make a big record here, where one isn't necessary.

What is your idea, Mr. Robinson, on that?

MR. ROBINSON: Your Honor, I don't think we will need this record.

It is my desire to keep this record down to a minimum. We don't know, at this time, what the outcome of this case is going to be but, certainly, from the standpoint of my client, the expense involved is a very important item.

We wouldn't want this lengthy record of the trial introduced here, unless it is actually necessary, and we object to it.

MR. THOMPSON: If it doesn't become apparent, as the Court suggested, that it has any relevancy in this particular proceedings; but if, later, it should become relevant, then it may be filed at that time.

THE COURT: That is right, or such parts of it as do have a bearing.

MR. THOMPSON: Your Honor, we would like to ask Mr. Robinson to clarify this point in the petition—while Mr. Robinson is speaking on the point: there is this allegation at the end of "Paragraph 4:"

> "***and, in fact, the proceedings against her in said tribunal, before, during and after the trial, were conducted in contravention of the express mandates of the Constitution and laws of the United States and without regard to due process of law under the American Judicial system."

Now, if Mr. Robinson will clarify what he means by that?

We assume he doesn't question the regularity of the proceedings in this Court, under the Rules of that Court and that he is not questioning what the Rules are, as set down in Ordinance 31, as referred to before and argued before the Court.

THE COURT: I take it, unless the stipulation of facts includes something that is intended to bear out that allegation, that the traverse of the respondent is sufficient refutation. The petition is filed: it is traversed.

MR. THOMPSON: We filed a return; they traversed our return.

THE COURT: All right, the return of the respondent, then, denying that part of the petition is sufficient unless there is some fact introduced which shows that the contention is still made and that is what I had reference to: if such facts are introduced, even in argument, then the Court will permit the record to be referred to.

Respondent's Exhibit 5

THE AXIS IN DEFEAT

A Collection of Documents on American Policy Toward Germany and Japan

THE DEPARTMENT OF STATE

(P. 23-24)

ACT OF MILITARY SURRENDER
May 8, 1945

1. We the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Supreme High Command of the Red Army all forces on land, at sea, and in the air who are at this date under German control.

2. The German High Command will at once issue orders to all German military, naval and air authorities and to all forces under German control to cease active operations at 2301 hours Central European time on 8th May 1945, to remain in the positions occupied at that time and to disarm completely, handing over their weapons and equipment to the local allied commanders or officers designated by Representatives of the Allied Supreme Commands. No ship, vessel, or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment, and also to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general.

3. The German High Command will at once issue to the appropriate commanders, and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force and by the Supreme High Command of the Red Army.

4. This act of military surrender is without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations and applicable to GERMANY and the German armed forces as a whole.

5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender, the Supreme Commander, Allied Expeditionary Force and the Supreme High Command of the Red Army will take such punitive or other action as they deem appropriate.

6. This Act is drawn up in the English, Russian and German languages. The English and Russian are the only authentic texts.

Signed at Berlin on the 8. day of May, 1945

FRIEDEBURG KEITEL STUMPF

On behalf of the German High Command

IN THE PRESENCE OF:

On behalf of the
Supreme Commander
Allied Expeditionary
Force
A. W. TEDDER

On behalf of the
Supreme High Command
of the Red Army
G. ZHUKOV

At the signing also were present as witnesses:

F. DE LATTRE-TASSIGNY
General Commanding in Chief
First French Army

CARL SPAATZ
General, Commanding
United States Strategic Air Forces

(The Axis in Defeat—P. 62)

DECLARATION REGARDING DEFEAT OF GERMANY AND ASSUMPTION OF SUPREME AUTHORITY BY ALLIED POWERS [1]

June 5, 1945

THE GERMAN ARMED FORCES on land, at sea and in the air have been completely defeated and have surrendered unconditionally and Germany, which bears responsibility for the war, is no longer capable of resisting the will of the victorious Powers. The unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her.

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers.

It is in these circumstances necessary, without prejudice to any subsequent decisions that may be taken respecting Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

The Representatives of the Supreme Commands of the

United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the French Republic, hereinafter called the "Allied Representatives," acting by authority of their respective Governments and in the interests of the United Nations, accordingly make the following Declaration:—

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.

[1]Signed at 1800 hours, Berlin time, by Dwight D. Eisenhower, General of the Army, USA; Zhukov, Marshal of the Soviet Union; B. L. Montgomery, Field Marshal, Great Britain; De Lattre de Tassigny, General d'Armee, French Provisional Government.

(The Axis in Defeat—P. 68)

STATEMENT ON CONTROL MACHINERY IN GERMANY[1]

1. In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme

[1]Made on June 5, 1945 by the Governments of the United States, the Union of Soviet Socialist Republics, the United Kingdom, and the Provisional Government of the French Republic.

authority in Germany will be exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a political adviser.

YVETTE J. MADSEN, *Petitioner*

v.

NINA KINSELLA, Warden, Federal Reformatory for Women, Alderson, West Virginia, *Respondent*

Habeas Corpus No. 1095

JOSEPH S. ROBINSON
745 Fifth Avenue
New York 22, New York

HARRINGTON & GRAHAM
(DAYTON M. HARRINGTON, ESQ.)
454 Washington Building
Washington 5, D. C.

JACKSON, KELLY, MORRISON & MOXLEY (JOHN C. MORRISON, ESQ.)
Kanawha Valley Building
Charleston, West Virginia
for Petitioner

A. GARNETT THOMPSON, ESQ.,
United States Attorney
Charleston, West Virginia

JOHN M. RAYMOND, COLONEL,
Assistant Legal Adviser
Department of State
Washington 25, D. C.

JOSEPH M. SWEENEY, ESQ.
Assistant to the Legal Adviser
Department of State
Washington 25, D. C.
for Respondent

BEN MOORE, *District Judge*

OPINION

On October 20, 1949, petitioner, being the wife of a Lieutenant serving in the American Army in the American Zone of Occupied Germany, and residing with her husband pursuant to military permission in Buchschleg, Kreis Frankfort, shot and killed her husband. She was tried before a tribunal originally known as a "United States Military Government Court for Germany," but whose name was later changed to the "United States Court of the Allied High Commission for Germany, Fourth Judicial District", which Military Government Court was created by an ordinance promulgated by the Department of the Army of the United States through the office of the Adjutant General. The crime with which she was charged was violation of Section 211 of the German Criminal Code, which defines the crime of murder and prescribes the penalty therefor. She was found guilty and, pursuant to Sections 51 and 44 of the same Code, ameliorating the punishment in certain cases, was sentenced to a term of fifteen years' confinement "in the Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct."

On appeal to the Court of Appeals of the United States Courts of the Allied High Commission for Germany the conviction and sentence were affirmed; but the order of commitment was modified so as to provide that petitioner be committed "to the custody of the Attorney General of the United States or his authorized representative for

imprisonment for a term of fifteen (15) years from 20 October 1949."

Purusant to this commitment petitioner was confined in the Federal Reformatory for Women at Alderson, West Virginia, where she has since been in custody of the warden. She now seeks release by means of the writ of habeas corpus.

By Proclamation No. 2 of the Commanding General, United States Forces, European Theater, dated September 19, 1945, and addressed "To the German people in the United States Zone," it was declared in Article II thereof that "the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation" except as otherwise provided by Military Government or other competent authority. See 12 F.R. 212, p. 6997.

Pursuant to Military Government Ordinance No. 31, which became effective August 18, 1948, a system of courts known as United States Military Government Courts for Germany was established for the United States Zone. These courts superseded other military courts which had theretofore been functioning in that area. Article 3 of the ordinance provides for a District Court in each of eleven judicial districts, established in accordance with Article 2. Article 4 provides for a Court of Appeals. Under Article 7 the jurisdiction of District Courts is extended to "all persons in the United States Area of Control" (meaning the United States Zone of Occupation) "except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations." The Article contains the limitation that "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command." It further

provides that District Courts shall have jurisdiction to hear and decide not only those cases arising under legislation of the Allied Control Council and the United States Military Government; but also cases involving offenses under German law in force in the Judicial District of the Court. Ordinance No. 32 furnishes a code of criminal procedure for these courts. See 14 F.R. 7, pp. 124-8.

On December 11, 1948, by a letter to the Chief Attorney, United States Military Government Courts for Germany, General Lucius D. Clay, Commander-in-Chief, European Command, authorized the trial of any dependent of a member of the United States Armed Forces before the appropriate Military Government Court established by Ordinance No. 31, unless trial by court-martial should be directed in a particular case.

United States Military Government in Germany was carried on under the Department of the Army from its inception until September 21, 1949. On that date, the Occupation Statute for Western Germany, agreed to by the governments of the United States, the United Kingdom and France, was declared to be in force, thus putting into effect the Charter of the Allied High Commission, also agreed to by those governments. The Allied High Commission thereby came into existence, replacing the Office of Military Government for Germany. This likewise effected a change of the Office of United States Military Governor to that of United States High Commissioner.

The Occupation Statute restored full judicial powers to the German people subject to certain reserved powers which embraced the protection, prestige, security and immunities of Allied Forces and dependents. The Statute further provided for the codification of legislation based upon the reserved powers, which legislation was to remain in force. See 14 F.R. 239, pp. 7456,7: Law No. 13

of the Allied High Commission, which became effective January 1, 1950, provided that German courts shall not exercise criminal jurisdiction over the Allied Forces. See 15 F.R. 38, pp. 1056,7. Law No. 2, effective September 21, 1949, defines the expression "Allied Forces," whenever used in legislation of the Allied High Commission, as including members of the families of members of the Occupation Forces. See 14 F.R. 239, p. 7457.

By Law No. 1 of the United States High Commissioner, effective January 1, 1950, the name of the courts established under Ordinance No. 31 was changed from "United States Military Government Courts for Germany" to "United States Courts of the Allied High Commission for Germany." See 15 F.R. 71, p. 2086. The composition of these courts was left unchanged, and their criminal jurisdiction, insofar as dependents of members of the Allied Forces were concerned, was the same as that which had been exercised prior to the Occupation Statute. As already stated, it was one of these courts which, on February 20, 1950, brought petitioner to trial and later convicted her of the crime with which she was charged.

It should be said at the outset that whenever a prisoner invoking the power of a federal court files a petition containing allegations which, if true, entitle him to his freedom, the Great Writ of habeas corpus is the appropriate means whereby the right is tested. If the decision depends on disputed facts, the function of the Court is simple. The Court merely determines from the evidence what the facts are and renders judgment accordingly, the law not being in dispute.

On the other hand, in cases such as we have here, the Court faces a harder task. Petitioner and respondent are in complete agreement on the facts. Petitioner's challenge of the government's right to hold her in custody raises legal questions only; but it probes deeply into fundamental principles concerning limitations on executive

and judicial power, and involves also the interpretation of important constitutional and statutory provisions.

These questions should be resolved by the Court only so far as they concern the rights of petitioner, but insofar as they do affect those rights, it is the duty of the Court to consider them fully and without regard to how the answers may impinge upon other persons or situations. The right of one illegally detained to be discharged from custody upon establishing the unlawful character of the detention is a right which must be granted though the full power, policy and governmental machinery of the State or Nation be arrayed in an effort to retain that custody.

Proceeding, therefore, to examine the problems presented, we find that petitioner's substantial contentions are as follows:

First, that the court by which she was tried and sentenced was lacking in jurisdiction to try anyone (especially any American citizen) because it was not established nor were its judges appointed by any authority known to the American Constitution or to the common law of war.

Secondly, that if it should be held that the court had jurisdiction to try American citizens, yet it had no such jurisdiction to try them for violations of German law, nor to deny to them any of the rights guaranteed by the Constitution of the United States to its citizens when tried in its courts.

Thirdly, that petitioner is one of a class of persons who, by the provisions of the Articles of war, is subject to the exclusive jurisdiction of courts-martial.

Aside from a rather technical argument that an American citizen convicted abroad of an offense against the laws of a foreign country cannot legally be confined in

a United States penitentiary, the foregoing are the only grounds urged by petitioner for her release.

The Constitution of the United States is the supreme law of the land, in war as well as in peace. However, its guaranties have no extra-territorial scope. When an American citizen (not a member of the Armed Forces) enters a foreign country, he becomes amenable to the laws of that country, and is triable by its courts, whose procedure may or may not be in conformity with American concepts of justice and fair play.

It may happen, as was the case with Germany, that unconditional surrender to a conquering army completely wipes out local sovereignty, leaving the territory of the conquered nation, pending a treaty of peace, without any body of enforceable law save that which may be imposed by the conqueror. The power, as well as the duty, then devolves upon the conquering nation, through the commander-in-chief of its occupying army, to provide a government to take the place of that which has been overthrown. One of the essential functions of this substitute government is to enact or adopt and administer a body or code of criminal laws. Historically and according to the law of war this is accomplished through decrees of the military commander-in-chief, establishing the law, framing the system of courts, prescribing rules of procedure, and appointing the judges.

The power of the United States thus to govern a conquered and occupied country does not stem from any explicit provision of the Federal Constitution. It is, however, implicit in the words of that instrument which make the President the commander-in-chief of the army and navy. Congress is vested by the Constitution with the power to declare war, and to raise and support armies; but the President, as commander-in-chief, is given the power to wage the war which Congress has declared. *Ex parte Quirin*, 317 U.S. 1, 26; Winthrop,

Military Law and Precedents, (2nd Ed. 1920 Reprint), p. 831.

To establish and maintain civil government in a conquered country is certainly a function which grows out of the power to wage war. The situation in Germany is unusual in that the occupation has lasted more than five years; there is still no treaty of peace; and the occupying force still exercises all governmental functions which have not been restored to the German people by the Occupation Statute of September 21, 1949; yet despite this prolongation, the status remains that of a temporary occupation of conquered territory, and the relationships of all persons within its boundaries are fixed and determined by the law of war.

The chain of authority whereby the Military Government Courts were established and their jurisdiction delineated is clear. The Allied Powers, having conquered Germany, announced on June 5, 1945, their assumption of supreme authority within that country. This was followed on July 14, 1945, by a proclamation of General of the Army Dwight D. Eisenhower establishing a military government in the United States Zone. See 12 F.R. 212, p. 6997. Then came in succession Proclamation No. 2, Military Government Ordinances Nos. 31 and 32, the Occupation Statute, Laws Nos. 2 and 13 thereunder, and finally Law No. 1 of the United States High Commissioner changing the name of the courts. These acts of military legislation provided for every detail of the creation, composition, jurisdiction and procedure of the occupation courts.

I am not impressed by petitioner's argument that there was a change in the nature or power of the court merely because, prior to the effective date of the Occupation Statute, the system of which it was a part operated under orders of the Department of the Army, but was afterwards carried on through the Department of State. It

makes no difference through what agency he may act; the President is still commander-in-chief, and as such vested with power to continue the military government during the transition period between the cessation of hostilities and the treaty of peace. It is worthy of note that the Federal Constitution, from which the President's power as commander-in-chief is derived, makes no mention of separate departments of the government, nor does it limit him in the exercise of the powers which go with the office of military commander-in-chief.

I conclude that petitioner is one of a class jurisdiction over which was reserved by the Occupation Statute; and that the court which tried her had jurisdiction of her person, unless by the Articles of War such jurisdiction was vested exclusively in courts-martial, a question which will be later discussed.

The trial court also had jurisdiction of the subject matter. It is argued by respondent that because Proclamation No. 2, making German law applicable throughout the United States Zone of Occupation, was addressed to the German people, it could therefore have no application to American citizens. This contention is without merit. It is clear that the purpose of Proclamation No. 2 was to give German law a territorial, not an ethnological, application. It was not essential to its effectiveness that it be addressed to any particular group of people. It was sufficient that it be announced publicly as a decree of the commanding general. Moreover, we are not confined to Proclamation No. 2 in seeking and finding authority for the trial of American citizens for violation of German laws. Ordinance No. 2, whereby the predecessors of the later Military Government Courts were established in occupied Germany on November 10, 1946, (See 12 F.R. 66, pp. 2190,1), gives those courts jurisdiction over "all offences under the laws of the occupied territory or of any part thereof," and Ordinance No. 31, creating the

court which tried petitioner, gives it jurisdiction of "offenses under German law in force in the Judicial District of the Court." There is no restriction of the jurisdiction to German citizens, and no exemption therefrom of American citizens.

If American citizens in occupied Germany (not under military law) were not subject to German criminal laws, what law or system of laws would control their actions? Not being under military law, they could not be required to obey the Articles of War; no criminal laws for the governance of occupied Germany other than the German criminal laws have been promulgated by the occupying authorities; so, if the criminal laws of Germany were not made applicable to non-military American citizens residing in that occupied country, as well as to the German people, we should behold the absurd spectacle of a class of persons licensed to commit all manner of crimes with impunity, because no criminal laws exist to which they are answerable.

Nor was it improper for the Military Government to authorize a code of criminal procedure which differed from that prescribed for courts-martial in the Articles of War. As we have seen, these military tribunals are created pursuant to the President's power to wage the war which Congress has declared. It cannot be said that they are necessarily to be governed in procedural matters by the provisions of the Articles of War enacted to guide trials by court-martial. The President has independent power to establish such rules of procedure as he may see fit.

It is therefore clear that petitioner's American citizenship did not immunize her from trial for a violation of the German statute against murder.

As to petitioner's complaint that she was deprived of certain rights guaranteed by the Bill of Rights of the

United States Constitution, it is sufficient to say that the law has long been settled that these guaranties do not apply to citizens of the United States living or sojourning in a foreign country who are brought to trial in that country on charges of violating local laws. *In re Ross,* 140 U. S. 453; *Dorr* v. *United States,* 195 U.S. 138; *Balzac* v. *Porto Rico,* 258 U. S. 298; *In re Bush,* Habeas Corpus No. 3544, (unpublished), D.C. D.C., June 29, 1949. The *Balzac* and *Dorr* cases were both concerned with the question of whether Constitutional guaranties were effective in territories acquired by the United States, but not yet incorporated as a part thereof. It was held in those cases that the guaranties were not applicable, the Court saying in the *Dorr* case (at p. 149):

> "We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, §3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

Since the Bill of Rights of the Federal Constitution is inoperative with respect to legal proceedings in territory owned by the United States; though not officially absorbed into its corporate body, *a fortiori* these guaranties do not control a trial such as petitioner underwent.

It was stated in argument that the chief contention of petitioner is that courts-martial of the United States Army of Occupation had exclusive jurisdiction to try her, and that the trial in such case must have been for a violation of the Articles of War and must have been conducted according to the procedure prescribed by the

Articles of War. The basis of this contention is that Article 2 of the Articles of War, bringing under military law persons "accompanying" the army in a foreign country or in the field in time of war, is applicable to petitioner as the wife of an army officer residing with him at an Army Post in occupied Germany.

Prior to the year 1916 Article 2 of the Articles of War did not extend to persons accompanying the army. This class of persons was made subject to military law by an amendment adopted in that year. Congress, by Article 15 of the Articles of War, enacted simultaneously with the amendment to Article 2, provided as follows:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war be lawfully triable by such military commissions, provost courts, or other military tribunals."

These two articles, with some slight changes in the language of Article 15 not material here, have been in effect since 1916.

Petitioner recognizes that concurrent jurisdiction was by Article 15 reserved to military commissions and other military tribunals to try certain classes of offenders and offenses; but she maintains that this jurisdiction was confined to persons who by statute are made amenable to such commissions or who commit offenses against the laws of war; that is, offenses such as relieving or communicating with the enemy; carrying on illicit trade or intercourse; spying, pilferage; or abusing prisoners. In my opinion, this interpretation of the language reserving jurisdiction to military commissions and tribunals is much too narrow. Offenses which by the *law* of war are triable by military commissions and other military tri-

bunals include offenses against the *laws* of war, but are not confined to such offenses. The law of war, as defined by Winthrop, comprises "those principles and usages which, in time of war, define the status and relations not only of enemies—whether or not in arms—but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes their trial and punishment when offenders." Winthrop, p. 773. It is under the law of war, as thus defined, that military tribunals such as the court which tried petitioner are created, and it is in accordance therewith that their jurisdiction is defined. The law of war imposes upon an occupying army the obligation to furnish the inhabitants of the country with a system of laws and courts; and since the power must be coextensive with the obligation, the jurisdiction of the military courts or commissions which are set up by the occupying army extends to whatever matters may be committed to such tribunals by the commander-in-chief of the occupation force. This construction is one which has long been recognized, as is witnessed by the following excerpt from an opinion of the Judge Advocate General of the Army, reported in *Digest of Opinions of the Judge Advocates General* (1912 edition) at page 1067:

> "The jurisdiction of the military commission is derived primarily and mainly from the law of war; . . . Military commissions are authorized by the laws (sic) of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which *martial law* has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the

military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals."

The reservation of jurisdiction to military commissions and other military tribunals by Article 15 of the Articles of War was therefore plenary in its scope. They were not deprived of any jurisdiction which they could theretofore lawfully exercise. The only question to be decided in this connection is: Did military commissions and other military tribunals prior to the year 1916 have jurisdiction to try the wife of a soldier residing with her husband in an occupied foreign country?

No case has been brought to my attention involving the trial of a soldier's wife by a military commission; but no difference is perceived between her status prior to the 1916 amendment and that of any other civilian who might be accompanying the army although not connected with it in any of its activities; and since military tribunals undoubtedly had jurisdiction to try such other persons for violations of local criminal laws, this jurisdiction would necessarily extend to the wives of soldiers. It is true that some support may be found in Winthrop's treatise for the theory that wives who accompanied their soldier husbands were to be regarded as "retainers to the camp" (See Winthrop, p. 99, note 94); but this conception of a wife's function, which may have been tenable in more primitive times, had certainly lost its force long prior to the year 1916. No one, being realistic, could say that at that time a wife who accompanied her husband on a tour of duty in the army was a "retainer to the camp."

Moreover, the inclusion of retainers to the camp and persons accompanying or serving with the armies of the United States in those classes of persons who are subject to military law was not made by Congress for the purpose of extending protection or immunity to such persons. The army in time of war, and particularly while

on foreign soil, needs a swift and efficacious means of dealing with all persons who are connected with it in any way. "All delays are dangerous in war." It is for the better discipline of the army and the more efficient conduct of military operations that Article 2 of the Articles of War brings under military law certain classes of persons who are not soldiers in the army. There is no indication anywhere in the Articles of War that these persons are not subject as well to the concurrent jurisdiction of military commissions or other military tribunals when such tribunals have been established in occupied countries and vested with jurisdiction to enforce local laws.

I am of opinion therefore that prior to the 1916 Amendments to the Articles of War, the wives of soldiers in occupied foreign territory who committed crimes against local laws which military commissions or tribunals had been set up to administer were triable by such military tribunals; and that Article 15 effectively reserved jurisdiction to such tribunals to try and punish such persons.

I do not find it necessary to decide whether or not petitioner, as the wife of a soldier, is properly classified as a person "accompanying" the army. It is not admitted by respondent that she ought to be so classified, but if not so classified, she was at least a dependent of an army officer. It will be readily noted that if she is properly classified as a person "accompanying" the army, and therefore subject to military law, then the military court which tried her had concurrent jurisdiction, while if she is to be classed as a civilian dependent of an army officer but not subject to military law, then that court had exclusive jurisdiction. Therefore, her classification becomes immaterial.

Finally, it is petitioner's claim that she was improperly committed to the custody of the Attorney General of the United States for imprisonment in a penitentiary, because commitment to the Attorney General's custody is

authorized only for those persons convicted of offenses against the United States (citing 18 U.S.C. 4082), whereas petitioner was convicted of an offense under the German Criminal Code. It is enough to say that the statute here applicable is 10 U.S.C. 1452, which provides that "Persons sentenced to confinement upon conviction by courts-martial or other military tribunals of crimes or offenses which, under some statute of the United States or under some law of the State, Territory, District, or other jurisdiction in which the crime or offense may be committed, are punishable by confinement in a penitentiary . . . may be confined . . . in any United States, State, Territorial, or District penitentiary, or in any other penitentiary directly or indirectly under the jurisdiction of the United States . . . " It is clear that the clause "or other jurisdiction in which the crime or offense may be committed" widens the territorial orbit of applicability of the statute so as to embrace United States citizens tried and convicted by courts established abroad under the authority of the United States, such as was the military tribunal which tried and convicted petitioner. Inasmuch as 10 U.S.C. 1452 does not designate the person to whose custody one convicted by a military tribunal is to be committed, I think it was proper that the Court of Appeals place petitioner in the custody of the Attorney General, pursuant to a directive to that effect of the Secretary of State of the United States.

Petitioner has alleged no fact which warrants her release. Therefore an order will be entered remanding her to the custody of the Attorney General.

(Signed) BEN MOORE
United States District Judge

September 8, 1950.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

In the Matter of the Petition of	Habeas
ARTHUR CURTIS ANTRIM BUSH	Corpus
For Writ of Habeas Corpus.	No. 3544

Washington, D. C.,
Wednesday, June 29, 1949.

. . . . . .

Opinion

THE COURT (HOLTZOFF, J.): This is a petition for a writ of habeas corpus presented in behalf of a civilian citizen of the United States who was arrested in Japan and convicted by an American general provost court in Japan on a charge of unlawfully disposing of certain Government property. . . .

The first objection raised to the validity of the conviction pursuant to which petitioner is imprisoned is that the provost court had no jurisdiction of the person of the petitioner in respect to the crime with which he was charged. At the time the offense is alleged to have been committed, the petitioner concededly was a civilian employee of the Army and, therefore, under the Articles of War was subject to court-martial jurisdiction. Prior to his arrest, however, he had resigned from his Army employment, and under the recent decision of the Supreme Court in the *Hirshberg* case courts-martial lost jurisdiction over him. He was tried, however, before a general provost court and not by a court-martial.

As was indicated in my remarks in this case on the motion to dismiss the petition, provost courts are American military tribunals created in Japan by the United States Army for the trial of offenses committed by

American nationals. While ordinarily military personnel are not tried by provost courts, but are tried by courts-martial, the Court is, nevertheless, of the opinion that provost courts have in law concurrent jurisdiction with courts-martial over military personnel. The Court reaches this conclusion on the following basis and for the following reasons.

Provost courts are created primarily for the trial of civilians charged with the commission of crimes within the territorial jurisdiction of the provost courts in areas subject to military law. But it is well recognized that civilian tribunals—that is, civil courts—have concurrent jurisdiction with courts-martial over military personnel. It seems to the Court that by analogy provost courts, which were created primarily for the trial of civilians, have in law concurrent jurisdiction with courts-martial over military personnel. To be sure, it is not customary to use provost courts for that purpose. This circumstance does not detract from the fact that jurisdiction exists, even though it may not be frequently invoked. Consequently, the Court reaches the conclusion that the provost court throughout had concurrent jurisdiction over this petitioner. When the petitioner ceased to be subject to court-martial jurisdiction, provost courts had sole jurisdiction over the person of the petitioner. The Court, therefore, is bound to reject the contention of the petitioner that provost courts had no jurisdiction over the petitioner when the crime was committed and could not thereafter acquire jurisdiction, after the petitioner ceased to be subject to the Articles of War.

The next point advanced by the petitioner is the contention that provost courts are unconstitutional tribunals as respects citizens of the United States, in that they make no provision for indictment by grand jury and a trial by jury. It is argued that the petitioner has been deprived of these two basic constitutional rights and

that, therefore, the judgment of conviction is void and should be set aside. This raises a very fundamental and basic question, namely, whether the guarantees of the Bill of Rights are applicable to citizens of the United States before a tribunal of the United States sitting outside the United States.

It has been said time and time again that the Constitution does not follow the Flag everywhere. For example, there are no grand juries in the Canal Zone and there are none in the Virgin Islands, because neither the Canal Zone nor the Virgin Islands is an organized territory of the United States. Consular courts and other extraterritorial courts, such as the United States Court of China, which at one time were functioning in the Orient, with jurisdiction to try citizens of the United States charged with committing crimes in those countries, always functioned without a grand jury and frequently without a jury. This procedure has been approved by the Supreme Court. *In re Ross*, 140 U.S. 453, 464. In the case just mentioned, Mr. Justice Field stated:

> "The Constitution can have no operation in another country."

The Court might add that recently it was held that the Fourth Amendment does not extend to citizens of the United States in foreign countries. *United States* v. *Best*, 76 Federal Supplement, 857, 864. Not only the authorities but also the history of this aspect of our jurisprudence inescapably leads to the conclusion that the Bill of Rights does not apply to trials conducted outside the United States. Moreover, it has always been consistently held that the provisions of the Bill of Rights relating to indictment by grand jury and to trial by jury do not apply to military tribunals operating either under the Articles of War or under the laws of war or international law.

The Court reaches the conclusion, therefore, that the petitioner has not been deprived of any constitutional rights. Beyond examining the jurisdiction of the military tribunal this Court may not go. Any errors at the trial, any alleged insufficiency of evidence, any alleged insufficiency of charges, or any other matters dealing with occurrences at the trial are not subject to review by a writ of habeas corpus. In habeas corpus proceedings, the only matters that may be considered are the jurisdiction of the court in which the petitioner was tried and, further, the question whether he was deprived of any constitutional rights in the course of his trial.

In the light of the considerations that have just been discussed, the Court reaches the conclusion that the petition for a writ of habeas corpus should be denied.

Extract from Opinion of Court of Appeals of United States Military Courts for Germany Appearing in I Court of Appeals Reports, Pages 207, 208, 211, 224, 226-227, and 232.

UNITED STATES MILITARY GOVERNMENT
COURTS FOR THE UNITED STATES
AREA OF CONTROL IN GERMANY

UNITED STATES MILITARY GOVERNMENT
v. WILMA BAKER YBARBO

Case No. 52 Opinion No. 19

Argued 1 March 1949

Decided 14 March 1949

Before—CLARK, Chief Judge, and GOODMAN, FULGHUM, ROBINSON, and SEDILLO, Associate Judges.

CLARK, Chief Judge, delivered the Opinion of the Court.

The Military Government charged the defendant appellant with killing her husband, a Sergeant in the Mili-

tary Police. She admitted firing the fatal shots, but claimed that they were fired in self-defense. The charges were laid under Section 7 of Article I of Military Government Ordinance No.1[1] and under Section 211 of the Germant Criminal Code.[2] The case was tried by a three judge court[3] sitting as the District Court for the Third Judicial District of the Military Government Court System. The crime alleged was committed at Fritzlar in that district.

The court, after a trial lasting ten days, found the defendant guilty under the Ordinance and under Section 212 of the German Criminal Code (the charge was so amended), and sentenced her to 20 years imprisonment on each charge, the sentences to run concurrently. She, as is her right,[4] now appeals to this Court. In both the trial court and in this Court, the defendant was represented by able United States counsel. She had every opportunity and did consult with said counsel in preparing her trial, during the trial and in preparation of this appeal.

The appellant makes certain legal objections which, if valid, vitiate the entire proceedings in the court below. They must, accordingly, be considered in limine. She says that she has been tried in the wrong court and under the wrong law.

. . . . . .

The defendant's claims that she has been tried by the wrong court and by the wrong law are in reality only one claim. They depend upon the answer to a single question: If the appellant may only be tried by court martial, the only law applicable to her is found in that enactment of the Congress known as the Articles of War.

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[1] Military Government Regulations 23-214.

[2] The Statutory Criminal Law of Germany, War Department Pamphlet No. 31-122, p. 140.

[3] Military Government Ordinance No. 31, Art. 3, Sec. 5.

[4] Ibid, Art. 12, Sec. 4.

If, on the other hand, the jurisdiction of a court martial over her is not exclusive, she can be tried by such court and by such law as the Military Governor in Germany may prescribe and ordain.

. . . . . .

We have reached the conclusion that a court martial and the law applicable therein is not the only court and not the only law in which and by which the defendant can be tried. It will be conceded that the Military Governor has the right to establish other courts and prescribe other laws for that purpose. The Military Governor in Germany has followed the traditional practice of other Military Governors whose duty it has been to command occupation forces. He has established military tribunals in one of which the defendant has had her trial. The various commanders of the U. S. Occupying Forces in history have not always followed a uniform practice with respect to the law ordained by them for the military tribunals. General Kearney, for instance, in Mexico established his own code. General Brook, on the other hand, in Cuba accepted the Cuban law. The Military Governor in Germany has followed the practice of General Brook and has ordained that the law applicable to U. S. civilians charged with crime is the German Criminal Code."

. . . . . .

In prescribing the German law, the Military Governor has acted in accord with (1) what the Supreme Court in an early case arising out of the occupation of Mexico called "enlightened policy";[97] (2) with the principles of the conflict of law;[98] and (3) with international law.[99] It will be conceded that by the law of nations an occupying power has only the right to interfere with the

[97] M. G. Ordinance No. 31, Art. VII, Sec. 2c.
[98] Fleming v. Page (1850), 13 L. Ed. 278.
[99] Restatement of Conflicts of Law, Sec. 377.
[100] Oppenheim, Vol. II, 349.

law of the occupied territory. If such interference is necessary in the interests of public order and safety. This conception has received the sanction of Article 43 of the Hague Convention."[102] It may be observed that to try Americans and Germans in the same court by different sets of laws is certainly no way to teach the democracy stated to be a principal object of the occupation."[103] The conflicts of law have since the earliest times recognized the rule that where you act, by the law of that place are you punished.[104] As we have seen, law is territorial. The safety of the occupying forces is amply secured by the enforcement of the German Criminal Code. The crimes are well defined and the punishments adequate.

. . . . . .

The finding of guilty under the first charge is reversed and the sentence imposed under it set aside.

The finding of guilty under the alternate first charge is upheld but the sentence thereon reduced to five (5) years imprisonment, beginning on the 21st of September 1948.

IT IS SO ORDERED:

Military Government—Ordinance No. 2; Military Government Courts—(12 Federal Register 2190)

"*Article I; kinds of military courts.* (1) General Military Courts.

"(2) Intermediate Military Courts.

"(3) Summary Military Courts.

"*Article II; jurisdiction.* (1) Military Government courts shall have jurisdiction over all persons in the

[101] Ibid.

[102] Military Government Regulations 1-301 and 302.

[103] Hunt Report (1920) Chapter V.

occupied territory except persons other than civilians who are subject to military, naval or air force law and are serving under the command of the Supreme Commander, Allied Expeditionary Force, or any other Commander of any forces of the United Nations.

"(2) Military Government Courts shall have jurisdiction over:

"(i) All offences against the laws and usages of war.

"(ii) All offences under any proclamation, law ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

"(iii) All offences under the laws of the occupied territory or of any part thereof."

. . . . . .

"*Article V; rights of accused.* (1) Every person accused before a Military Government Court shall be entitled:

"(i) To have in advance of trial a copy of the charges upon which he is to be tried;

"(ii) To be present at his trial, to give evidence and to examine or cross-examine any witness; but the court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent, or if the accused is believed to be a fugitive from justice;

"(iii) To consult a lawyer before trial and to conduct his own defense or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing before the court;

"(iv) In any case in which a sentence of death may be imposed, to be represented by an officer of the Allied Forces, if he is not otherwise represented;

"(v) To bring with him to his trial such material

witnesses in his defense as he may wish, or to have them summoned by the court at his request, if practicable;

"(vi) To apply to the court for an adjournment where necessary to enable him to prepare his defense;

"(vii) To have the proceedings translated, when he is otherwise unable to understand the language in which they are conducted;"

. . . . . .

Military Government Law No. 2: German Courts (12 Federal Register 2191)

. . . . . .

"*Article VI; limitations on jurisdiction.* (1) Except when expressly authorized by Control Council or Military Government Law, ordinance or regulation, or by order of the Director of Military Government of the appropriate Land, no German court shall assert or exercise jurisdiction in the following cases or classes of cases:

"(i) Criminal cases involving:

"(a) Any of the United Nations, or

"(b) The Armed Forces of any of the United Nations, or

"(c) Any person serving with any such Forces or a dependent accompanying any of them, or

"(d) Any national of the United Nations, or

. . . . . ."

Military Government—United States Area of Control: Proclamation No. 1 (12 Federal Register 6997)

"To the People of Germany:

"I, General Dwight D. Eisenhower, Commanding General, United States Armed Forces in Europe, do hereby proclaim as follows:

"Article I. As announced on 5 June 1945, supreme authority with respect to Germany has been assumed

by the Governments of the United States, The United Kingdom, the Union of Socialist Soviet Republics, and the Provisional Government of the French Republic.

"Article II. The United States Zone of Occupation is occupied by United States Forces under my command and a Military Government under my authority is established therein. All persons in such Government Zone will obey immediately and without question all of the enactments and orders continued in effect or issued by me or under my authority.

. . . . . .

"Dated: 14 July 1945.

Dwight D. Eisenhower,
General of the Army, Commanding General of the United States Armed Forces in Europe."

Military Government—United States Area of Control: Proclamation No. 2 (12 Federal Register 6997)

"To the German people in the United States Zone:

"I, General Dwight D. Eisenhower, Commanding General, United States Forces, European Theater, do hereby proclaim as follows:

. . . . . .

"Article II. Except as heretofore abrogated, suspended or modified by Military Government or by the Control Council for Germany, the German law in force at the time of the occupation shall be applicable in each area of the United States Zone of Occupation, until repealed by, or superseded by a new law enacted by the Military Government or the states hereby constituted or by other competent authority."

. . . . . .

"Dwight D. Eisenhower,
General of the Army, U.S.A., Commanding General, United States Forces, European Theater.
Dated: September 19, 1945."

(14 Federal Register 124-129)

NATIONAL MILITARY ESTABLISHMENT
DEPARTMENT OF THE ARMY

United States Military Government Courts for Germany

Creation and Organization; Codes of Procedure

. . . . . .

Ordinance No. 31; United States Military Government Courts For Germany; Creation of the Courts—(a) Article 1; Judicial System.

A system of courts is hereby established for the United States Area of Control of Germany, which term is defined as comprising the Laender of Bavaria, Bremen, Hesse, Wuerttemberg-Baden and the United States Sector of Berlin. The courts so created shall be known as United States Military Government Courts for Germany.

ORGANIZATION OF THE COURTS

(b) *Article 2; Judicial Districts.* The following judicial districts are hereby established within the United States Area of Control:

. . . . . .

Fourth Judicial District: Comprised of Kreise Bergstrasse, Buedingen, Darmstadt, Dieburg, Erbach, Frankfurt, Friedberg, Gelnhausen, Grossgerau, Hanau, Limburg, Maintaunus, Obertaunus, Offenbach, Rheingau, Schluechtern, Untertaunus, Usingen, Wiesbaden, all in Land Hesse;

. . . . . .

(c) *Article 3; District Courts.* (1) A District Court is hereby established for each judicial district within the United States Area of Control.

. . . . . .

(3) Each District Court shall consist of one or more istrict Judges and one or more Magistrates who shall singly except as provided in subparagraph (5) of this aragraph.

. . . . . .

(5) A District Court composed of three District udges or two District Judges and a Magistrate may ear and decide any civil or criminal case, and, in the tter, may impose any lawful sentence including death. majority of such Court shall decide any case before it, ovided that no sentence of death shall be imposed ex- pt by the unanimous decision of the Court.

. . . . . .

(7) In addition to or in lieu of any power of sentence rein authorized, a District Judge or a Magistrate may:

(i) Make such order concerning any property or busi- ss involved in an offense; or

(ii) Make such order concerning the person of the cused; as is authorized by law.

(8) Where an accused is charged with an offense der German law, the Court shall be limited to the sen- nce or other penal provision of such law.

. . . . . .

(d) *Article 4; Court of Appeals.* (1) A Court of Ap- als is hereby established for the United States Area Control.

. . . . . .

JURISDICTION OF THE COURTS

(g) *Article 7, Jurisdiction of District Courts in Crim- al Cases.* (1) District Courts shall have criminal juris- tion over all persons in the United States Area of Con- l except persons, other than civilians, who are subject military, naval or air force law and are serving with

any forces of the United Nations. No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command. No member of an Allied Mission, visiting governmental official, or person subject to the military law of any country other than the United States, shall be brought to trial for any offense except upon authorization of the Military Governor.

(2) District Courts shall have jurisdiction to hear and decide cases involving;

(i) Offenses under legislation issued by or under the authority of the Allied Control Council;

(ii) Offenses under United States Military Government Legislation;

(iii) Offenses under German law in force in the Judicial District of the Court.

. . . . . .

(j) *Article 10; Venue.* (1) The trial of all criminal cases, except as provided in subparagraph (3) of this paragraph, shall be by the District Court in the District in which the alleged offense was committed, unless a Judge of the Court of Appeals on application of the Chief Attorney directs that it be tried in the District where the accused was residing or stationed at the time the alleged offense was committed or in the District where the accused was arrested or imprisoned.

. . . . . .

(l) *Article 12; Jurisdiction of the Court of Appeals.* (1) The Court of Appeals shall have original jurisdiction to act on applications for release from confinement when the person is confined by virtue of a sentence of a Court composed of more than one Judge.

(2) The Court of Appeals shall have appellate jurisdiction to consider on appeal final orders of individual

Judges of the Court of Appeals and final judgment and orders of the District Judges except as provided in paragraph (i) (4) of this section. The appeal may include both questions of law and of fact except that, in dealing with questions of fact, the Court shall set aside or reverse the decision of the District Court in criminal cases only if the evidence does not support a finding of guilt beyond a reasonable doubt and in civil cases only if the evidence does not substantially support the judgment.

. . . . . .

(4) In any case in which a District Court has imposed a penalty of ten years or more, the Court of Appeals shall, upon application of the person or persons convicted grant leave to appeal.

. . . . . .

(7) Upon any appeal or review the Court of Appeals may reduce the sentence, vacate the findings in whole or in part, enter a judgment for the defendant or set the judgment, or findings and sentence aside and order a new trial, and issue any other order or orders appropriate in the circumstances. In any case on review under subparagraph (6) above, where a new trial is ordered and such new trial results in a conviction, the sentence may not be increased.

PERSONNEL OF THE COURTS

(m) *Article 13; Appointment and Removal.* (1) The Chief Judge and Associate Judges of the Court of Appeals and the Chief Attorney shall be appointed by the Military Governor upon the advice of his Legal Adviser. All other Judges and Magistrates shall be appointed by or under the authority of the Military Governor upon the advice of his Legal Adviser and the Chief Judge of the Court of Appeals. All Assistants to the Chief Attorney and all District Attorneys and their assistants shall be appointed by or under the authority of

the Military Governor upon the advice of his Legal Adviser and the Chief Attorney.

. . . . . .

Ordinance No. 32; code of criminal procedure for United States Military Government Courts for Germany—

. . . . . .

(d) *Article IV; Matters preliminary to trial.*

. . . . . .

(6) The Court before which the accused is to be tried shall inform the accused of his right to the aid of counsel in every stage of the proceedings and before any further proceedings are had.

(7) If the accused desires to procure and consult with counsel he shall be afforded a reasonable opportunity to do so. If he is unable to obtain counsel himself after making reasonable efforts to do so, the Court may, and in cases other than those before a Magistrate shall, appoint counsel for him and grant the accused a like opportunity to consult therewith, unless the accused waives this right.

(8) If the accused is charged with an offense for which the District Attorney is asking a death sentence, representation by counsel is mandatory and no proceedings shall be had until counsel has been procured or assigned.

Occupation Statute
(14 Federal Register 7456)

Declaration Concerning the Entry into Force of the Occupation Statute

"Whereas by letter dated 12 May 1949 the Military Governors and Commanders-in-Chief of the French, United States and British Zones of Germany, respectively informed the President of the Parliamentary Council at

Bonn that the Occupation Statute had been promulgated by them as of that date, and that, 'upon the convening of the legislative bodies provided for in the Basic Law and upon the election of the President and the election and appointment of the Chancellor and the Federal Ministers, respectively, in the manner provided for in the Basic Law, the Government of the Federal Republic of Germany will then be established and the Occupation Statute shall thereupon enter into force'; and

"Whereas the conditions aforesaid have been satisfied; and it is expedient formally to declare the entry into force of the Occupation Statute;

"Now, therefore, the Council of the Allied High Commission hereby declares that the Occupation Statute entered into force as from 21 September 1949.

"Done at Bonn, Petersberg, on 21 September 1949."

"A. Francois-Poncet,
French High Commissioner for Germany,

John J. McCloy,
U. S. High Commissioner for Germany,

B. H. Robertson,
U. K. High Commissioner for Germany."

Text of Occupation Statute Promulgated on the 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones

"In the exercise of the supreme authority which is retained by the Governments of France, the United States and the United Kingdom,

"We, General Pierre Koenig, Military Governor and Commander-in-Chief of the French Zone of Germany,

"General Lucius D. Clay, Military Governor and Commander-in-Chief of the United States Zone of Germany, and

"General Sir Brian Hubert Robertson, Military Governor and Commander-in-Chief of the British Zone of Germany,

"Do hereby jointly proclaim the following Occupation Statute:

"1. During the period in which it is necessary that the occupation continue, the Governments of France, the United States and the United Kingdom desire and intend that the German people shall enjoy self-government to the maximum possible degree consistent with such occupation. The Federal State and the participating Laender shall have, subject only to the limitation in this Instrument, full legislative, executive and judicial powers in accordance with the Basic Law and with their respective constitutions.

"2. In order to ensure the accomplishment of the basic purposes of the occupation, powers in the following fields are specifically reserved, including the right to request and verify information and statistics needed by the occupation authorities:

. . . . . .

"(e) Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities and satisfaction of occupation costs and their other requirements;

. . . . . .

"(i) Control of the care and treatment in German prisons of persons charged before or sentenced by the courts or tribunals of the occupying Powers or occupation authorities; over the carrying out of sentences imposed on them; and over questions of amnesty, pardon or release in relation to them.

"3. It is the hope and expectation of the Governments of France, the United States and the United Kingdom

that the occupation authorities will not have occasion to take action in fields other than those specifically reserved above. The occupation authorities, however, reserve the right, acting under instructions of their Governments, to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments. Before so doing they will formally advise the appropriate German authorities of their decision and of the reasons therefor.

. . . . . .

"7. Legislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities in accordance with the following provisions:

"(a) Legislation inconsistent with the foregoing will be repealed or amended to make it consistent herewith;

"(b) Legislation based upon the reserved powers, referred to in paragraph 2 above will be codified;

"(c) Legislation not referred to in (a) and (b) will be repealed by the occupation authorities on request from appropriate German authorities.

. . . . . "

Allied High Commission: Law No. 2
(14 Federal Register 7457)

Article 1

"In the absence of any indication to the contrary, in legislation of the Allied High Commission:

"1. The expression 'Occupation Authorities' shall include the Council of the Allied High Commission, the High Commissioners, and Allied Organizations and persons exercising power on their behalf.

"2. The expression 'Occupation Forces' shall include the Armed Forces of the Occupying Powers and auxiliary contingents of other Powers serving with them.

"3. The expression 'Allied Forces' shall include—

"(a) The Occupation Authorities.

"(b) The Occupation Forces and their members.

"(c) Non-German nationals, civilian or military, who are serving with the Occupation Authorities.

"(d) Members of the families and non-German persons in the service of the persons referred to in subparagraphs (a), (b) and (c) of this paragraph.

. . . . . .

"Done at Bonn, Petersberg, on 21 September 1949.

A. Francois-Poncet,
French High Commissioner for Germany,

John J. McCloy,
U. S. High Commissioner for Germany,

B. H. Robertson,
U. K. High Commissioner for Germany."

Allied High Commission: Law No. 3
(14 Federal Register 7458)

"

. . . . . .

"Article 5. References in any legislation enacted before the entry into force of the Occupation Statute to the Control Council, the Supreme Commander Allied Expeditionary Force, the Commanding General, the Armed Forces, Military Government, the Military Governor and to other authorities shall, where the context so requires or admits, be deemed to refer to the appropriate authorities exercising the particular functions mentioned in such legislation.

"Article 6. This law shall become effective on the 21st September 1949.

"Done at Bonn, Petersberg, on 21 September 1949.

A. Francois-Poncet,
French High Commissioner for Germany.

John J. McCloy,
U. S. High Commissioner for Germany.

B. H. Robertson,
U. K. High Commissioner for Germany."

Allied High Commission: Law No. 13
(15 Federal Register 1056)

Judicial Powers in the Reserved Fields

"The Council of the Allied High Commission enacts as follows:

"Article 1. Except when expressly authorized, either generally or in specific cases, by the High Commissioner of the Zone in which the Court is located, German Courts shall not exercise criminal jurisdiction:

"(a) (i) Over the Allied Forces;

. . . . . .

"Done at Bonn, Petersburg, on 25 November 1949.

B. H. Robertson,
U. K. High Commissioner for Germany.

A. Francois-Poncet,
French High Commissioner for Germany.

George P. Hays
for John J. McCloy,
U. S. High Commissioner for Germany."

U. S. High Commissioner: Law No. 1
(15 Federal Register 2086)

. . . . . .

"Article 1. Article 1 of the United States Military Government Ordinance No. 31, 'United States Military Government Courts for Germany', is hereby amended by changing the last sentence of said Article to read as follows:

" 'The Courts so created shall be known as the United States Courts of the Allied High Commission for Germany.'

. . . . . .

"This Law is applicable within the Leander of Bavaria, Bremen, Hesse, and Wuerttemberg-Baden and the United States Sector of Berlin. It shall become effective on January 1, 1950.

"Done at Frankfurt-on-Main, on December 28, 1949.

John J. McCloy,
United States High Commissioner for Germany."

COUNSELS' NOTE—All court papers printed herein were completely executed, whether or not herein so indicated. The copies furnished the printer were perforce office copies, without opportunity of completion from originals, which were in the hands of the Clerk of the Court of Appeals.

[fols. 115-117] PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6220

YVETTE J. MADSEN, Appellant,

versus

NINA KINSELLA, Warden of the U. S. Reformatory for Women, Appellee

Petition for Leave to Prosecute Appeal in Forma Pauperis and Order Granting Same—(Omitted in Printing)

[fol. 118] Order Extending Time to File Record on Appeal —(Omitted in Printing)

[fol. 119] Minute entries—(omitted in printing).

Order Permitting Appellee to File Brief in Excess of Fifty Printed Pages—(Omitted in Printing).

[fol. 120] Argument and Submission—(Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6220.

YVETTE J. MADSEN,
Appellant,

versus

NINA KINSELLA,
WARDEN OF THE U. S. REFORMATORY FOR WOMEN,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, AT CHARLESTON.

(Argued March 12, 1951. Decided April 2, 1951.)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Joseph S. Robinson (Dayton M. Harrington; James D. Graham, Jr.; Harrington & Graham; John C. Morrison, and Jackson, Kelly, Morrison & Moxley on brief) for Appellant, and John M. Raymond, Assistant Legal Adviser, Department of State, (A. Garnett Thompson, United States Attorney, and Joseph M. Sweeney, Assistant Legal Adviser, United States State Department, on brief) for Appellee.

PARKER, Circuit Judge:

This is an appeal from an order refusing to discharge appellant in a habeas corpus proceeding. Appellant was convicted of murdering her husband, an officer in the American Army, in the American Zone of Germany, by a trial court set up under the authority of the United States in the occupied territory. The conviction was affirmed but the sentence slightly modified by a reviewing court, similarly set up in the occupied territory under authority of the United States, and appellant was sent to the Federal Reformatory for Women at Alderson, West Virginia, for the service of the sentence imposed upon her. She sought release from this imprisonment by suing out a writ of habeas corpus; but her petition was denied by the District Judge in an able and comprehensive opinion which fully sets forth the facts of the case, the constitution of the occupation courts and the law under which appellant was convicted. See *Madsen* v. *Kinsella* 93 F. Supp. 319.

Little need be added here to what was said by the District Judge. There can be no question as to the power of the United States, as an incident of the occupation of Germany, to set up courts in the occupied territory and to give such courts jurisdiction over American nationals in the territory. "The establishment of such courts is but the exercise of the ordinary rights of conquest." *Mechanics etc. Bank* v. *Union Bank* 22 Wall. 276, 296. It is the duty of an occupying power to provide, as far as possible, for the security of persons and property and the administration of justice within the territory; and this is a military duty which devolves upon the President, as

commander in chief, who is entrusted as such with the direction of the military force by which the occupation is held. *Santiago* v. *Nogueras* 214 U.S. 260, 266; *The Grapeshot* 9 Wall. 129; *Leitensdorfer* v. *Webb* 20 How. 176; *Cross* v. *Harrison* 16 How. 164, 189.

We think it entirely immaterial that the President at the time of the trial of appellant was carrying on military government in the occupied zone of Germany through the state department instead of through the army and was using civilians instead of army personnel as judges of the courts. It was for the President, as commander in chief, to use such governmental department or agency as he thought proper in governing the conquered territory; and Congress in making appropriations to the army for the expenses of the occupation expressly authorized the President to transfer to other departments functions provided for under the appropriations. P.L. 327, 81st Cong. 63 Stat. 621. While military government, under that name, terminated September 21, 1949, the Office of the United States High Commissioner for Germany took over its functions and exercised the powers and authority of a "military" government, i.e. a government based on a military occupation. As stated in Winthrop, Military Law and Precedents, pp. 1246-1248:

> "The authority for military government is the fact of occupation * * *. There must be a full possession, a firm holding, a government de facto.
>
> "Military government, thus founded, is an exercise of sovereignty, and as such dominates the country which is its theatre in all branches of administration. Whether administered by officers of the army of the belligerent, or by civilians left in office or appointed by him for the purpose, it is the government of and for all the inhabitants, native or foreign, wholly superseding the local law and civil authority except

in so far as the same may be permitted by him to subsist. . . .

"The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent."

And we think it equally clear that the occupation courts had authority to try appellant for murder under the law of Germany. It is the general law that local criminal law in an occupied area continues to bind civilians unless changed by the occupying power. *Dow* v. *Johnson* 100 U.S. 158, 166; *Ketchem* v. *Buckley* 99 U.S. 188, 190. In addition to this, a proclamation of General Eisenhower of September 19, 1945, 12 Federal Register 6997, provided that German law should be applicable in the occupied territory until repealed or superseded by a new law enacted by the military government. German courts were forbidden to exercise jurisdiction in criminal cases involving wide classes of persons including not only the armed forces of the United Nations but also "any person serving with any such forces or a dependent accompanying any of them" or "any national of the United Nations" (12 Federal Register 2192); and military government courts were given jurisdiction of all offenses of civilians under the laws of the occupied territory. 12 Federal Register 2190. See *U.S. Military Government* v. *Ybarbo* 1 Court of Appeals Reports (Germany) 207.

Appellant's principal contention is that exclusive jurisdiction to try her for the crime of murder was vested in the courts martial of the army, under the 92nd Article of War, 10 USCA 1564, since she claims that she was a

person accompanying the army within the meaning of the 2nd Article of War, 10 USCA 1473. There is grave doubt whether a wife living with her officer husband is a person accompanying the army within the meaning of that article; but we need not go into the question, since we think it clear that, even if it be assumed that appellant occupied that status, the jurisdiction vested in courts martial over her was not exclusive and she was properly tried by the occupation court.

There can be no question but that prior to the 1916 amendments to the articles of war a military court, such as that by which appellant was tried, would have had jurisdiction to try her. *Neely* v. *Henkel* 180 U.S. 109; *Ex Parte Ortiz* 100 F. 955; *United States* v. *Reiter* Fed. Cas. No. 16,146. As said in the Digest of Opinions of the Judge Advocate General of the Army (1912) pp. 1066-7:

> "By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders * * *. Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which martial law has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil

authority is superseded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State, or district."

Article 92 of the Articles of War was amended in 1916 to provide that any person subject to military law who commits murder shall suffer death or imprisonment for life as a court martial may direct; and Article 12 was amended to provide that courts martial should have "power to try any person subject to military law for any crime or offense made punishable by these articles." It was not provided, however, that the jurisdiction of the courts martial should be exclusive and the contrary was expressly provided by Article 15, which was new. That article provides, 10 USCA 1486:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

The purpose of the section was explained before the Subcommittee on Military Affairs of the Senate by General Crowder in 1916 (see note 31, 327 U.S. 65) as follows:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court.

It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced * * *.

"It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."

Referring to this section, the Supreme Court, speaking through Chief Justice Stone in *In re Yamishita* 327 U.S. 1, 7, said:

"Article 15 declares that the 'provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions * * * or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions * * * or other military tribunals.' See a similar provision of the Espionage Act of 1917, 50 U.S.C. sec. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions 'any other person who by the law of war is subject to trial by military tribunals,' and who, under Article 12, may be tried by court-martial, or under Article 15 by military commission."

The precise question here involved was passed upon in

U. S. Military Government v. *Ybarbo, supra,* by the United States Court of Appeals in the occupation area. Chief Judge Clark, speaking for the court in that case, said:

> "The Military Government court in which the defendant has been tried seems to be clearly either a 'military commission' or another 'military tribunal'. Under the Common Law of War, Military Commissions (or as they are here called, Military Government Courts) had jurisdiction over soldiers and civilians. That jurisdiction was expressively saved to them by Article 15 of the Articles of War. The earliest commissions established by General Scott during the occupation of Mexico in 1847 exercised jurisdiction over all persons for civil crimes. During the civil war, prior to the passage of the Enrollment Act of 3 March 1863 such commissions functioned under the law of war and were convened as early as 1861. General McClellan at Yorktown ordered that 'acts commonly recognized as crimes against society by soldiers, officers and other persons connected with the Army' were 'punishable by a Court or Military Commission.' After the Enrollment Act of 1836 military commissions continued to exercise their common law jurisdiction. Winthrop cites many cases of soldiers and civilians who were tried by Military Commissions under the reconstruction acts.
> • • •
> "When Congress enacted the present Article of War 15, it would seem that it did so with the full knowledge that it was saving to Military Commissions the jurisdiction it had theretofore exercised over soldiers as well as civilians under the Law of War."

Coleman v. *Tennessee* 97 U.S. 509 and *Dow* v. *Johnson* 100 U.S. 158, upon which appellant relies, are not in point. They hold merely that courts martial of the army have exclusive jurisdiction to try members of the armed

forces for crimes alleged to have been committed by them while engaged in the occupation and that they are not subject to the laws or jurisdiction of the courts of the army. There is nothing in this to support the contention that civilians following the army may not be tried for offenses which they commit by military courts or commissions set up under the authority of the commander in chief.

Contention is made that the sentence of imprisonment was illegal; but the contention is entirely without merit. Defendant was guilty of a major crime, which under the law of Germany was punishable by death or imprisonment for life. She has no ground of complaint that the sentence of imprisonment was for only fifteen years or that it was in a penitentiary designated by the Attorney General pursuant to the judgment of the court. Confinement in a penitentiary in the United States of those convicted by military tribunals is expressly authorized by statute. 10 USCA 1452. In view of this, the distinction which appellant attempts to draw between confinement and imprisonment under German law has no relevance.

For the reasons stated, the judgment appealed from will be affirmed.

Affirmed.

[fol. 130] UNITED STATES COURT OF APPEALS

YVETTE J. MADSEN, Appellant,

vs.

NINA KINSELLA, Warden of the U. S. Reformatory for Women, Appellee

JUDGMENT—Filed April 2, 1951

Appeal From the United States District Court for the Southern District of West Virginia.

This Cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, [redacted], and the same is hereby, affirmed.

April 2, 1951.

John J. Parker, Chief Judge, Fourth Circuit.

[fols. 131-132] IN THE SUPREME COURT OF THE UNITED STATES

Stipulation as to Printing Record—(Omitted in Printing)

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 25, 1951

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31st, 1951.

Fred M. Vinson, Chief Justice of the United States.

[fol. 135] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER ALLOWING CERTIORARI—November 5, 1951

On consideration of the motion for leave to proceed herein forma pauperis and of the petition for writ of certiorari it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 411.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U. S.
FILED
JUL 26 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

~~82 MISC.~~

No. 411

YVETTE J. MADSEN,

Petitioner,

v.

NINA KINSELLA, Warden of the U. S. Reformatory for Women,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOSEPH S. ROBINSON,
~~745 Fifth Avenue,~~
New York 22, New York,

HARRINGTON & GRAHAM,
454 Washington Building,
Washington 5, D. C.,

JOHN C. MORRISON,
1601 Kanawha Valley Building,
Charleston 22, West Virginia,

Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. .....

YVETTE J. MADSEN,

Petitioner,

v.

NINA KINSELLA, Warden of the U. S. Reformatory for Women,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Fourth Circuit, dated April 2, 1951, which affirmed the order of the United States District Court for the Southern District of West Virginia discharging the writ of habeas corpus and remanding her to the custody of the Respondent.

Opinions Below

The opinion of the Court of Appeals is reported in 188 F. 2d 272. The opinion of the District Court (R. 78-93) is reported in 93 F. Supp. 319.

Jurisdictional Statement

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254(I). The judgment of the Circuit Court of Appeals was entered April 2, 1951. The time within which to file this petition was extended to July 29, 1951, by order of Chief Justice Vinson dated June 29, 1951.

Statement of Facts and Matters Involved

Petitioner, Yvette J. Madsen, is a native-born American citizen and the mother of two infant children. She was the wife of a United States army officer, Lieutenant Andrew E. Madsen, now deceased. She and her husband entered the American Zone of Occupied Germany in November, 1947, as a part of the military forces of the United States.

That she was accompanying the armies of the United States and was therefore a person subject to military law within the purview of Article of War 2 is admitted by the pleadings (Verified Petition, par. 1, R. 4; which allegation was not denied in the Return, R. 17). The Agreed Statement of Facts (R. 27, 28) states, among other things, that she enjoyed all the privileges and immunities of persons in the armed forces of the United States and that *"she enjoyed all the immunities from German jurisdiction granted persons in the Armed Forces of the United States"*.

On October 20, 1949, Petitioner was arrested by the Air Force Military Police and charged before a so-called *United States Military Government Court* with the murder of her husband in violation of *Paragraph 211 of the German Criminal Code* (R. 4, 28, 34-35).

Prior thereto and on September 21, 1949, military government and the military occupation of Germany, as such, had terminated (R. 41-65)[1] and the German Federal Republic, with full legislative, executive and judicial pow-

[1] On April 8, 1949, the Department of State announced:

"The Occupation Statute will define the powers to be retained by the occupation authorities upon the establishment of the German Federal Republic and set forth basic procedures for the operation of Allied supervision. Subject only to the limitations of the Statute, *the German Federal State and the participating Laender will have full legislative, executive and judicial powers*, in accordance with the Basic Law and with their respective constitutions. The Statute aims to permit the German people to exercise democratic self-government. * * *

"With the establishment of the German Federal Republic there will be a marked change in the organization to carry out occupation responsibilities. *Military Government as such will be terminated and the functions of the Allied authorities will become mainly supervisory.* Each of the Allied establishments in Germany will come under the direction of a High Commissioner, aside from the occupation forces which will remain headed by Military Commanders." (Petitioner's Exhibit 2, R. 53-54)

On May 18, 1949, the Department of State announced:

"As United States High Commissioner, Mr. McCloy will be the supreme United States authority in Germany. Subject to consultation with and ultimate direction by the President, he will be under the immediate supervision and direction of the Secretary of State. He will have the authority to exercise all the governmental functions of the United States in Germany, other than the Command of the United States Occupation Forces." (Petitioner's Exhibit 3, R. 56)

In the Agreed Statement of Facts, it was stipulated:

*"United States Military Government in Germany was carried on under the Department of the Army until 21 September 1949. * * * On that date also the Office of Military Government for Germany (the agency which had been administering military government) ceased to function except for certain liquidating operations* and the Office of the United States High Commissioner for Germany became the United States agency in the American Zone of Occupied Germany through which the authority vested in the U. S. High Commissioner was exercised." (Italics supplied.) (R. 32.)

ers, except as limited by the Occupation Statute, came into being (R. 53-54). An Allied High Commission was established with authority to exercise only limited supervisory functions over the activities of the German Federal Republic (see testimony given before the subcommittee of the Committee on Appropriations for 1951. House of Representatives, Eighty-first Congress, Second Session, pp. 463-4; 478). Hon. John J. McCloy was designated United States High Commissioner pursuant to the provisions of the Foreign Service Act of 1946 and has functioned in that capacity under the immediate supervision of the Secretary of State (Executive Order 10062, R. 58).

Executive Order 10062, dated June 6, 1949, recognized the difference between the military functions of the U. S. Army in Germany and the political role of the State Department in that country. It directed that "with respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff" (R. 59). Mr. McCloy was not vested with any powers or functions with respect to military matters or army personnel, nor were any powers vested in him to appoint military tribunals such as is sometimes vested in military officers pursuant to express mandate of Congress (Articles of War 8, 15 and notes thereunder; Manual for Courts-Martial, 1949, par. 2).

On February 20, 1950, Petitioner, although charged by "United States Military Government" before a United States Military Government Court (R. 34), was brought to trial before a tribunal which called itself *"the United States Court of the Allied High Commission for Germany, 4th Judicial District"* (R. 39). Its asserted jurisdiction was that it was a continuation of the earlier U. S. Military Government courts except that its judges were appointed by the State Department instead of by the military authorities as was done formerly. As a reason for not bringing her to trial before courts-martial as directed by

Congress (Articles of War 92 and 93),[2] it was asserted that General Clay had, on December 11, 1948, authorized trial of all dependent wives before Military Government courts for *"any non-military offense"* (R. 13) and that murder was a non-military offense. Congress, however, expressly decreed that it was a military offense by adding it to the enumerated military offenses in the Act of 1874, Article of War 58, now 92, 93.

The tribunal which tried her was composed of three civilians who were referred to as District Judges. Its membership was not selected by any competent military command or even by Mr. McCloy, but by the "Chief Presiding District Judge" (a civilian) acting upon "authority" which he stated was vested in him (R. 66-67). The source of that "authority" was not made known, and counsel has been unable to learn from whence it stems. Congress has decreed power of selection and appointment to be in certain military officers and the President has decreed that that power was non-delegable (Manual for Courts-Martial, 1949, par. 5a, pp. 4-5).

The procedure which the tribunal followed was *not* that authorized by the Articles of War or the United States

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[2] ART. 92. Murder—Rape.—Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. Any person subject to military law who is found guilty of rape shall suffer death or such other punishment as a court-martial may direct: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

ART. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct: *Provided*, That any person subject to military law who commits larceny or embezzlement shall be guilty of larceny within the meaning of this article.

Criminal Code, but a set of self-made rules first adopted on August 18, 1948, when military government was in force (Mil. Govt. Ordinances 31, 32, 33). Other rules of similar character were employed prior to August 1948 (Mil. Govt. Ordinance 2).

The applicable substantive law applied in these tribunals, involved an offense under German law or an offense in violation of occupation directives. Such laws were intended for the German people only (JAGJ 1946/7691, 10 Dec. 1946, par. 9). Nevertheless, in this case a violation of the German Criminal Code was charged (R. 29, 34).[3]

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[3] The Theatre Judge Advocate for the U. S. Forces in Europe, in sustaining General McNarney's view that these courts should *not* be used for the trial of "American citizens, particularly those who are subject to military law within the purview of Article of War 2, said:

"* * * In military government courts, instead of stress being placed upon the rights of the accused, it is based upon the purpose of protecting the United States forces in occupation. * * * German law would define criminal offenses; and it is believed that, in order to secure competent representation in the interpretation of such laws in military government courts, an accused would engage the services of a German lawyer. In this connection it should be borne in mind that the right of effective representation by counsel has been held to be an integral part of the due process of law guaranteed by the Fifth Amendment. Such an antipathetic circumstance as representation by an enemy attorney, coupled with a failure to provide American citizens with the customary constitutional guarantees and procedural safeguards afforded in American courts (and in the main preserved in court-martial procedure), would have a disastrous impact. Under the present conditions in Germany it is believed that trial of dependents by court-martial would be fairer, more practical, and more acceptable to the American public to whom every public servant is held accountable. 'It is not only important that justice be done; it is equally important that the public believe that justice is being done' (Chief Justice Taft. * * *"

Continuing, the Theatre Judge Advocate said:

"The case history of Article of War 2(d) discloses sufficient evidence and adaptability to support a ruling that dependents are persons accompanying the Army in the field, thus rendering them subject to military law and amenable to trial by

The Petitioner, after her trial before this heretofore unheard of type of tribunal, was found guilty and sentenced to a term of fifteen years. To exhaust all remedies, and in order to lay the foundation for habeas corpus proceedings, she appealed to the U. S. Court of Appeals for the Allied High Commission. That tribunal, like the trial court, was composed of civilians appointed by the State Department. This same tribunal, when functioning under military auspices prior to the establishment of the Allied High Commission, in a case almost identical to the one here involved, wrote an opinion confirming its own juris-

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court-martial. Due consideration of all aspects of the problems of fairness and equality of justice, effective internal administration of the Army, security, morale, and discipline within the military community, would seem to require that dependents be governed much the same as those with whom they are commorant. It is believed that their trial by court-martial would be justified as a matter of law under the provisions of Article of War 2(d) as well as Article of War 12, and that they should be tried by courts-martial when the nature of the offense is such as to require trial rather than administrative disposition, and there is no other forum in which the safeguards and customs expected by Americans is provided." (JAGJ 1946/7691)

The above quotations are taken from a communication from General McNarney's Theatre Judge Advocate to the Judge Advocate General in Washington, asking reconsideration of the Judge Advocate General's Opinion of October 10, 1946 wherein the view was expressed that dependents, although amenable to trial before courts-martial, should not be so tried. General McNarney's own views in favor of courts-martial and against subjecting dependents to trial before other tribunals are set forth, in part, in a footnote in the Brief in support of this Petition. General McNarney indicated very strongly his opposition to the trial of American dependents before courts which lack Constitutional guarantees and safeguards. General Green, the Judge Advocate General, replied to General McNarney on 25 February 1947, saying that the earlier recommendations of his office were "advisory only." He then said, "At the same time, I wish to suggest caution as to such trials (court-martial trials of dependents)." His reasons for suggesting "caution"—which are not legal reasons—are then set forth. (JAGJ, 1946/7691, 26 February 1947.) Whether those words of caution served to prevent trial of this Petitioner and other defendants before courts-martial, is not known. Counsel can only surmise that it brought about the desired result.

diction and that of the trial court. That opinion, entitled *United States Military Government* v. *Wilma Baker Ybarbo,* appears in I Court of Appeals Reports 207 U. S. Mil. Govt. Courts for Germany. The rationale of that opinion and the one written by the United States District Court in this case are entirely different. One or the other must be wrong on the basis of their mutually conflicting reasoning. Petitioner contends both are wrong. The United States Court of Appeals, without regard to the conflict, cited both opinions with approval, even though they are inconsistent with several important decisions of this Honorable Court (see Brief attached).

Petitioner is presently confined at the Federal Reformatory for Women in Alderson, West Virginia, pursuant to the decree of the United States Court of Appeals for the Allied High Commission for Germany. That Court modified the lower Court's order respecting confinement "under a directive of the Secretary of State" (R. 37).

The question of the guilt or innocence of the Petitioner is not here in issue.[4] There is here in issue, however, the question of whether the organized system of military justice as prescribed by the Articles of War shall be controlling, or whether the Executive Branch of Government, acting through the State Department, the War Department, or any other agency or body, may substitute another system more to its liking.[5]

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[4] In *Ex parte Quirin,* 317 U. S. 1, 25, and again in *In re Yamashita,* 327 U. S. 1, this Court said:

> "We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. Ex parte Milligan, supra, 119, 132; Tumey v. Ohio, 273 U. S. 510, 535; Hill v. Texas, 316 U. S. 400, 406."

[5] Mr. Justice Jackson, in his speech before the Conference of Bar Association Presidents on September 16, 1950, expressed apprehen-

Reasons Relied Upon for Allowance of Writ and Questions Presented

This trial is unprecedented in our history. Never before have we brought an American citizen to trial before a civilian tribunal created by a State Department official, for an alleged violation of foreign law, and tried such person pursuant to self-ordained rules and without regard to Constitutional and statutory safeguards, as provided in the United States Code of Criminal Procedure for federal criminal cases or the Articles of War in military cases.

The District Court in its opinion said, that the issues here raised *"probe deeply into fundamental principles concerning limitations on executive and judicial power, and involve also the interpretation of important Constitutional and statutory provisions."* (R. 82)

So dangerous is the precedent established by the opinions of the Courts below, and so vast are its implications, that counsel fear it may well be a dragon's tooth sown in this era of expanding military power which could spring forth irrepressibly to further encroach upon rights heretofore held inviolate.

The decisions of the Courts below mean that the military, the State Department, or other administrative branch of the Executive, may bring to trial and punish any Ameri-

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sion concerning Constitutional rights during wartime. He said: "* * * a total war drags us inevitably in the direction of totalitarianism; and the longer the war lasts, the further we are drawn toward it. * * * We must all recognize that the war power is the Achilles heel of our Constitution. It is the most vague, the most expandable, the least definable, and once granted, it is the most difficult to recall." Mr. Justice Jackson urged lawyers not to let vigilante justice supplant organized justice. He insisted that organized justice, no matter how defective, is more considerate, more fair, and more responsible. Unquestionably the Articles of War, our organized code of military justice established by Congress, no matter how defective, is more considerate, more fair, and more responsible a body of rules than the impromptu system adopted and applied in this case.

can citizen who is subject to Article of War 2, even to the extent of inflicting death, without regard to Congressional enactments and in utter disregard thereof or in contravention thereof. It is claimed that Article of War 15 gave such power, in that it granted concurrent jurisdiction to "military commissions" or other "military tribunals" coextensive with that of courts-martial, and that such commissions or other military tribunals need not conform to the Articles of War or the Manual for Courts Martial in their application of either the substantive law or procedure. Even the personnel of our fallen enemy were not so exposed. (*In re Yamashita*, 327 U. S. 1.)

The decisions of the Courts below mean that the hundreds of thousands of Americans, soldiers[6] and civilians alike, serving or accompanying the Armed Forces in a war or occupation zone may be denied all rights under the Articles of War (both substantive and procedural) and be

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[6] The District Judge asked counsel for the Respondent, at the time of argument, if Lt. Madsen could have been tried before the so-called High Commission Court if the situations were reversed and Lt. Madsen had killed his wife, instead of his wife having killed him. The answer, if counsel recalls correctly, was an unequivocal "yes." Logically speaking, the answer could not have been otherwise. Both are "persons subject to military law" within the purview of Article of War 2. Both were triable before courts-martial for the offense of murder (Article of War 92). If, as Respondent contends, Article of War 15 granted to a military commission and other tribunals jurisdiction concurrent with that of courts-martial over offenses specifically made punishable by the Articles of War, then Lt. Madsen could have been tried by either tribunal and the will of the commanding officer directing trial before a military commission or other tribunal could thus supersede the will of Congress as expressed in the Articles of War. We would then have the strange spectacle of an American soldier being tried before a civilian court for a violation of foreign law. If the power was in the commanding officer or in a State Department official to make the choice of tribunals for Mrs. Madsen, as was held by the Courts below, then he had like power to act in a case involving Lt. Madsen. In addition, review on appeal would not be before a Military Review Board, as directed by Congress, but before a group of the commanding officer's choosing, assuming he decided to grant review at all. Subordinate State Department officials here assert that like power was vested in them. Obviously the road is paved with danger.

punished as willed by the military commander or some lesser official. As can readily be seen, these legal principles vitally affect the lives, liberty, and property of many Americans in all parts of the world and are of great importance far beyond the particular facts or the party in this case.

Determination of the rights of the Petitioner herein will also determine the rights of those thousands of other American citizens, soldiers and officers as well as other persons serving or accompanying the Armed Forces of the United States outside the territorial limits of the United States. All these Americans are entitled to know whether they are subject to trial and punishment pursuant to the laws of the United States as enacted in the Articles of War, or pursuant to such rules as the Military or State Department officials may, at their whim, decide to declare applicable.

Far more than the fate of Petitioner and far more than appears upon the surface in this litigation is in issue. The strides made by the military over the lives and liberty of persons within its control since the outbreak of World War II have been enormous. The State Department presently asserts the right to act with equal power. If the State Department has that power, why could not the Interior or Commerce Departments also exercise such power? The Courts below held that the creation of the tribunal in question stemmed from the President's war powers and that "it was for the President, as commander in chief, to use such governmental department or agency as he thought proper in governing the conquered territory * * * " (Opinion, Parker, C. J., p. 274). The District Court said substantially the same thing (R. 87). The door is now ajar—and only this Honorable Court is in a position to prevent continued subjugation of American citizens to the unfettered will of the military or other departments of the Executive Branch of our Government.

Some strange and novel doctrines concerning the rights of American citizens and the power of the Executive

Branch of the Government to exercise judicial, and legislative functions have been advanced by the Courts below which, unless reviewed and limited in scope, would tend to undermine the basic concepts of Constitutional government. (See Brief attached.) [7]

The decisions of the Courts below are in direct conflict with several important decisions of this honorable Court. *Coleman* v. *Tennessee*, 97 U. S. 509; *Dow* v. *Johnson*, 100 U. S. 158; *In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *The Exchange* v. *McFadden*, 11 U. S. 116; and a number of Circuit Court Opinions which bear on various aspects of this case, *Perlstein* v. *U. S.*, 151 F. 2d 167 (3rd Circuit); *Ex parte Gerlach*, 247 F. 616 (2nd Circuit); *Hines* v. *Mikell*, 259 F. 28 (4th Circuit); *Ex parte Jochen*, 257 F. 200 (5th Circuit); *Mobley* v. *Handy*, 176 F. 2d 491 (5th Circuit), and many eminent writers on the subject, as well as a series of decisions by the Judge Advocate General, all of which are referred to in the Brief in support of this Petition.

In addition, the decisions below mean that the oft-repeated adage that the Constitution and laws of the United States follow the flag, is to be placed in discard and that the *will* of the commanding general of an area, or the President of the United States acting through subordinates, may be substituted therefor. Respondents argued, with apparent success in the Courts below, that *"the appellant* [Petitioner herein] *has no rights under the Constitution or any statute which apply to her trial by an occupation court* [Millitary Commission] *in Germany."* (Brief of Appellee, p. 43: Italics added).

Individuals, even those not connected with the Armed Forces, are entitled, as this Honorable Court said in *Duncan* v. *Kahanamoku*, 327 U. S. 304, at p. 307:

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[7] President Washington, in his farewell address to the nation on 17 September 1796, warned: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism. * * * let there be no change by usurpation. * * * it is the customary weapon by which free governments are destroyed" (The Writings of George Washington, G. P. O., Dec. 1940, pp. 228, 229).

"* * * to have their guilt or innocence determined in courts of law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. Since these judicial safeguards are prized privileges of our system of government we granted certiorari."

In the *Duncan* case, the conviction was reversed with these potent statements by the Court:

"People of many ages and countries have feared and unflinchingly opposed the kind of subordination of executive, legislative and judicial authorities to complete military rule * * *" (p. 319).

"Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they value. *Ex parte Quirin*, 317 U. S. 1, 19. * * * We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the Constitution itself. See *Ex parte Milligan*, 4 Wall. 2; *Chambers* v. *Florida*, 309 U. S. 227. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government.

"Military tribunals have no such standing. For as this Court has said before: '* * * *the military should always be kept in subjection to the laws of the country to which it belongs, and that he is no friend to the Republic who advocates the contrary.* * *'" (pp. 322, 323). (Italics supplied.)

Preliminary Argument in Support of the Petition

It is a fundamental principle of our law that an American citizen may not be tried or imprisoned by the sovereign power of the United States except in accordance with the Constitution and laws of the United States and no decree, whether issued in the name of the President, his subordinate officers, or the military establishment, can direct otherwise. (*Ex parte Milligan*, 71 U. S. 2; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Ex parte White*, 66 F. Supp. 982; *Ex parte Quirin*, 317 U. S. 1, 19; *Ex parte Duncan*,

66 F. Supp. 976). Even our enemies must be offered "due process of law" when, *through judicial process*, punishment is sought to be imposed by American authorities. (*In re Yamashita*, 327 U. S. 1; *Ex parte Quirin*, 317 U. S. 1; *Hirota* v. *MacArthur*, 338 U. S. 197.

This case is not one which involves trial and punishment by a foreign power. Unquestionably an American may be punished by a foreign power in accordance with its laws for offenses committed within its jurisdiction in cases where they have custody of the accused. Insofar as this Government is concerned, however, the trial of any person, whether before a civilian or military tribunal, must be in accordance with our law and not in accordance with what the Executive Branch of the Government chooses to decree as law, either substantive or procedural. *Kurtz* v. *Moffitt*, 115 U. S. 487, 500; *McClaughry* v. *Deming*, 186 U. S. 49, 69; *Hamilton* v. *McClaughry*, 136 F. 445; *Ex parte Milligan*, 71 U. S. 2; *Ex parte White*, 66 F. Supp. 982; *Jecker* v. *Montgomery*, 54 U. S. 498, 515; *U. S.* v. *Symonds*, 120 U. S. 46; *Sterling* v. *Constantin*, 287 U. S. 378; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *In re Yamashita*, 327 U. S. 1, 9; *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45; *Dynes* v. *Hoover*, 61 U. S. 65, 78; *Mitchell* v. *Harmony*, 54 U. S. 115; *Ex parte Quirin*, 317 U. S. 1.[8]

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[8] In the *Milligan* case, at pp. 119-121, Mr. Justice Davis, writing for the Court, said:

> "The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. *If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings.* * * *
>
> *The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield*

Unless it can be shown that the Petitioner was tried and is presently imprisoned pursuant to some provision of the laws of the United States—a burden which is on Respondent [9]—it becomes the duty of this Court to declare the entire proceedings a nullity and to sustain the writ of habeas corpus.

Prayer for the Writ

For the reasons hereinabove stated, and those stated in the Brief in support of this Petition, it is respectfully prayed that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court a complete transcript of the record and all proceedings in the instant case so that the cause may be reviewed and determined by this Honorable Court and the judgment of the lower Court reversed; and Peti-

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of its protection all classes of men, at all times, and under all circumstances."

In the *Quirin* case, at p. 25, this Court said, "Congress and the President, like the courts, possess no power not derived from the Constitution."

[9] There are no presumptions in favor of the jurisdiction exercised by a military court. To give effect to its judgment it must be made to clearly and affirmatively appear that it was legally constituted, that it had jurisdiction over the person and the offense and that its proceedings including its judgment conform to law (*Dynes* v. *Hoover*, 61 U. S. 65; *Runkle* v. *U. S.*, 122 U. S. 543; *Hamilton* v. *McClaughry*, 136 F. 445). The burden of establishing compliance with the law is on Respondent, for as was said in the *Hamilton* case, *supra*, 447, 48: "'So jealous are all English-speaking nations of the liberties of their subjects, where a respondent in habeas corpus admits the restraint charged against him, he must justify by basing his right of restraint upon the exercise of some provision of positive law binding upon him, or the writ must issue and the person restrained have his liberty."

tioner respectfully prays that she be granted such other, further and equitable relief as this Court may deem just and proper.

JOSEPH S. ROBINSON
JAMES D. GRAHAM, JR.
DAYTON M. HARRINGTON
JOHN C. MORRISON,

Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

POINT I

The petitioner is a person serving and accompanying the armies of the United States without the territorial limits of the United States and is therefore a "person subject to military law" within the purview of Article of War 2.

The Articles of War in effect at the time this Petitioner was brought to trial state in the preamble, that said Articles "shall at all times and in all places govern the Armies of the United States." Article of War 2 places in the category of persons who are subject to the Articles of War, all soldiers, whether officers or enlisted men, cadets, certain classifications of officers of the Marine Corps, and *"All retainers to the camp and all persons accompanying or serving with the armies of the United States, without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."*

There is no distinction between soldiers and civilian persons accompanying the Army, in so far as their amenability to the Articles of War is concerned. They are all classified as "persons subject to military law."

If the State Department, as was done in this instance, or a military commander has the power to declare the Articles of War inapplicable to any civilian person or persons falling within the purview of Article of War 2, then like power exists to declare the Articles of War inapplicable to soldiers and officers. All are in the same category

and the distinction sought to be drawn by the Courts bel
is without legal justification.[10]

Sustaining the conviction here means, in substance, t
the State Department or the Military Establishment h
the power to decree that American soldiers or any oth

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[10] The lower Courts failed to distinguish *Coleman* v. *Tennes*
97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, which cases h
unequivocably that the personnel of our army are not subject
the laws of the area or country they occupy and that courts-mar
have *exclusive* jurisdiction over them. The District Court, H
Ben Moore, disregarded these cases entirely and made no ment
of them. Mr. Justice Clark, who wrote the opinion in the *Yba*
case (hereinabove referred to), while recognizing the significa
and applicability of those cases, held that those decisions of t
Honorable Court were merely *dicta* and not to be followed (
Point II of this Brief). Judge Parker, writing for the Court
Appeals, 4th Circuit, reasoned differently. He said that those
ings, the *Coleman* and *Dow* cases, applied *only* to "members
the Armed Forces" (presumably the Court meant men in unifor
and therefore were not applicable here. Congress drew no st
distinction in its enactment of the Articles of War. Congress cla
fied as persons subject to military law not only "members of
Armed Forces", but other persons as well, such as retainers
camp, persons serving with the army, persons accompanying
army, etc. They all fall within a group. They were all classif
as "persons subject to military law". To now subdivide that gr
and apply different rules to each subdivision is not warranted
anything Congress said or did, or by any judicial interpretation
the language Congress employed.

Article of War 92 directs that *"any person subject to military*
found guilty of murder" shall be punished *"as a court-martial m*
direct" and so forth. This statute is mandatory as to all persons
that classification and is not limited in its scope to "members of
Armed Forces" as the lower Court ruled.

It is difficult to believe, but Mr. Justice Clark, in the *Ybarbo* c
p. 224, said: "We have seen that for tactical reasons *the armies*
the field carry their own criminal law with them and that putting
in operation lies within the discretion of the military authoritie
No authority was cited for this strange doctrine that the Articles
War may be suspended, even for soldiers and officers, at the will
the military authorities. Congress, in the Preamble to the Artic
of War, said that those Articles *"shall govern,"* not *may gove*
The Court of Appeals for the Fourth Circuit agreed that *"sh*
govern" meant exactly what it says, but ruled that the Articles
plied to only a portion of the persons enumerated as being "subj
to military law" and not to all of them.

person subject to military law stationed in Germany, Austria, Italy, Japan, Korea, or elsewhere, may be tried before any self-created tribunal, for a violation of local law. Such power never existed and cannot be spelled out of the provisions of Article of War 15 or the so-called common law of war. (See cases cited under Point II.)

The reference in Article of War 2 to persons "accompanying" the Armies of the United States is not new in the current Articles which were enacted in 1920. Similar provision was contained in the 1916 enactment. Such provision, however, was not in effect in 1895 when Col. William Winthrop revised his work on Military Law which was substantially completed in 1880. Nevertheless, even under the old law, a dependent wife of a soldier or officer, as well as his family and servants, were deemed to be subject to military law and triable by courts-martial. (Winthrop's *Military Law and Precedents*, 2nd Ed., 1920 Rep., pp. 98-99). Ives, Hough, and other eminent writers on military law held likewise (Simmons, on *Courts Martial*, pp. 33, 34; *Hough, Precedents in Military Law*, p. 629; Ives, *A Treatise on Military Law*, pp. 59-61).[11]

Many cases, recently decided, hold that American civilians in a war area, even though not retained by or serving with the Armed Forces, are amenable to military law and therefore triable by courts-martial. (*Perlstein* v. *U. S.*, 151 F. 2d, 167, cert. denied 327 U. S. 777; *Ex parte Gerlach*, 247 F. 616; *Grewe* v. *France*, 75 F. Supp. 433; *In re Berue*, 54 F. Supp. 252; *McCune* v. *Kilpatrick*, 53 F. Supp. 80; *Ex parte Falls*, 251 F. 415; *Hines* v. *Mikell*, 259 F. 28, cert. denied 250 U. S. 645; *Hammond* v. *Squire*, 51 F. Supp. 227; *Mobley* v. *Handy*, 176 F. 2d. 491; *In re Di Bartolo*, 50 F.

[11] In footnote 94, on p. 99, Col. Winthrop wrote:

"Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons, Par. 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) 629."

Supp. 929; *Ex parte Duncan*, 66 F. Supp. 976; *Ex parte Jochen*, 257 F. 200).

The Agreed Statement of Facts (R. 27-28) indicates how integral a part of our Army, Petitioner was considered, and the extent of her activities as such.[12] If anything more is needed to classify her as a person "accompanying" the Army of the United States, than that set forth in footnote 12, it is difficult to understand what it is. Every privilege and immunity authorized persons in uniform was authorized this Petitioner. True, she was not

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[12] Respondent admits that, "In or about the month of November 1947 the petitioner and her husband entered the American Zone of Occupied Germany. Permission to so enter was granted to her by competent military authority. She was transported across the Atlantic Ocean on a vessel operated under the jurisdiction of the military authorities and without cost to herself. The orders for her transportation were issued by the military authorities and the said orders stated on their face that 'travel herein authorized is necessary in the military service.' An identification or 'AGO' card, identical to that issued to persons in military uniform, was issued to her by the War Department acting through the Adjutant General's Office. Transportation from the port of disembarkation was by train reserved exclusively for United States military personnel and was at Government expense. Petitioner and her husband were granted facilities, accommodations and billets established for the United States military forces. Petitioner's home was requisitioned for military use and was furnished and maintained by competent U. S. military authorities. Petitioner was authorized to and did use the facilities of the United States Army established for persons in the military service of the United States and persons serving with and accompanying the said armed forces, i.e., United States Army commissaries, United States military hospitals, United States Army post exchanges, United States Army Officers' messes, United States Army garage facilities, United States Army rail, automobile, air and water transportation, United States Army recreation centers, United States Army clothing and general merchandising stores, United States Army scrip (a special currency made available only for those authorized to use it, including persons in the military service of the United States). Petitioner was subjected to certain limitations imposed on persons in the military service, such as the prohibition against entering places marked 'off limits' to military personnel, etc. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States" (R. 27, 28).

in the employ of the Army, but neither are newspaper correspondents, employees of contractors, officers' servants, entertainers, Red Cross canteen workers, and so forth, all of whom have been held "subject to military law."

In the *Ybarbo* case, *supra*, at p. 213, the Court said: "Although without direct precedent, we are quite ready to concede that the Articles of War apply to the defendant (a dependent wife living with her soldier husband in Germany) and that therefore she is under their protection." The opinion, although agreeing that a dependent wife fell within the provisions of Article of War 2, held by tenuous arguments and a series of unsupported assumptions that said wife (Mrs. Ybarbo in that case) may be tried by a military government court because the commanding general *waived* court-martial jurisdiction over her. Mrs. Ybarbo was sentenced to imprisonment for a term of fifteen years for shooting her soldier husband. No petition for a writ of habeas corpus was filed by her or on her behalf because, for reasons best known to the military, she was set free within a short time after her conviction was affirmed.[18]

Winthrop's view that Article of War 2 should be strictly construed did not prevent his inclusion of families of soldiers and officers accompanying the Army in the category of "retainers to the camp," nor Ives' inclusion of them in the category of "persons serving with" the Armies. Both authors wrote before the 1916 amendment which added

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[18] Continued reference is made to the *Ybarbo* case because it was cited with approval by the Court below and is one of the basic authorities on which the Court below, as well as the Respondent, relied to sustain the conviction in this case. Various parts of that Opinion are discussed throughout this Brief. The situation, however, between the *Ybarbo* case and this case is not wholly analogous, because military government in Germany had ceased to exist at the time this Petitioner was tried (Dept. State Pub. 3556, pp. 88-89, 106). The Government's position is now, therefore, even more untenable.

the word "accompanying." The 1916 amendment makes the construction of Article of War 2 an easier task.[14]

The strict construction theory against enlarging the category of persons amenable to military law is predicated on the Article's creation of an "exceptional jurisdiction over civilians." If military jurisdiction is exceptional as contrasted with civil jurisdiction in the United States, then the Allied High Commission Court's jurisdiction and the Military Government Court's jurisdiction are even more exceptional as contrasted wih courts-martial jurisdiction. The former is almost exclusively by the will of the High Commissioner or military commander, while the latter is a very carefully circumscribed law enacted by Congress (Winthrop, *Military Law and Precedents*, 2nd Ed., pp. 100 and 801; Ives, *A Treatise on Military Law*, p. 60).[15]

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[14] Webster defines the word "accompany" as "to go with or attend as a companion or associate; to attend." (Collegiate Dictionary, 5th Ed.) In *Ex parte Gerlach*, 247 F. 616, 617, it was held that, the provision of Article of War 2, making persons who were "accompanying" the Armies amenable to military jurisdiction, was constitutional. The Court said that this section not only "enables military officers to preserve order on the part of such persons, but also * * * to call on them for assistance and direct their actions while they are properly in the field of military operations. The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War. * * *"

[15] If it is the national interest to avoid rendering the citizen amenable to the Articles of War, it is even more in the national interest to protect American Citizens from the laws of a foreign government, particularly one which was recently subjugated by force of arms. Such has been the rule enunciated in *Coleman* v. *Tennessee* and *Dow* v. *Johnson, supra.* It is also in the national interests to protect American citizens in an Occupied Zone from the self-ordained courts of a single individual, even though that individual be an American general, because in him is vested all executive, legislative, and judicial functions. *United States* v. *Diekelman*, 92 U. S. 520; *New Orleans* v. *Steamship Co.*, 87 U. S. 387. It may be prudent that one man exercise such powers over a conquered enemy where the victor must act quickly. Like reasoning does not apply in the case of American citizens, particularly those who have served in or as a part of our military forces. In *Dow* v. *Johnson, supra*, at p. 166, this Court said: "* * * but their continued enforcement (the laws

No functional relationship to the military mission is required to subject a person accompanying the Armies to military law (*VIII Bulletin*, JAG, June 1948, p. 70, also p. 126; *IV Bulletin*, JAG, June 1945, p. 226; *SPJGW* 1944, 8568, *III Bulletin*, JAG, p. 377). If any such relationship was required before the 1916 amendment, when the pertinent paragraph of the Article specified only *"retainers to the camp"* and *"persons serving with the army"*,—Winthrop and Ives either thought that there was no such requirement or that families of military personnel traveling with them satisfied the requirement. It seems obvious that those two categories embraced all persons accompanying the Army in a *functional* relationship, so that the addition of the category "persons accompanying" in 1916 must have been intended to embrace an additional class of persons, viz., those accompanying the Army not in any functional relationship.[16]

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of the occupied area) is not for the protection or control of the army or its officers or soldiers. These remain subject to the laws of war, and are responsible for their conduct only to their government and the tribunals by which those laws are administered. * * *"

[16] The fact that a dependent wife may not come into the occupied zone for her own convenience but may come only at the request of the member of the military establishment upon whom she is dependent, and the fact that the U. S. Government permits her to join her husband when he has so requested, indicate Government acknowledgment of the contribution, at least to the morale of the Army, made by wives who travel with their soldier husbands. This contribution to morale, plus whatever service they may render, give dependents as close a functional relationship with the military mission as have others, without whom the Army can function but whose presence with the Army is considered desirable and who have been held to be within the purview of Article 2. Such persons include employees of Post Exchanges (CM 120406-1918, Dig. Op JAG 1912-40, Sec. 359(12); CM 222383 (1942), IV Bull. JAG June 1945, p. 227), USO Camp Shows entertainers (SPJGA 1943/6116, 28 April 1943, IV Bull JAG, June 1945, p. 227), butlers (Winthrop, p. 98, note 87), officer's servants (Idem. p. 98, note 87) etc. Col C. B. Mickelwait, now General Mickelwait, held in JAGJ 1946/7691, 10 Dec. 1946 that dependents do serve in a functional capacity, but whether they do or not, they are still persons subject to military law under Article of War 2(d).

The true test of whether or not a person is "accompanying the Armies" within the meaning of Article of War 2 is whether the person is physically present or resident for a sustained period of time in a place reserved by competent military authority for members of the military establishment, with official acknowledgement by competent authority that such presence or residence is authorized; and the office of the Judge Advocate General so ruled.[17]

It would be a serious blow to the military establishment, who thus far have not appeared in this proceeding, were there to be a holding that a wife, who is in a military zone without the territorial jurisdiction of the United States in time of war, was not accompanying the Armies of the United States. All the authorities point to the conclusion that she does fall within the provisions of the Articles of War. Intimation to the contrary is contained in the opinion of the Court below. It expressed "grave doubt" on the subject. The expression of doubt is insufficient answer to the legal question here raised, because if Petitioner is "a person subject to military law," then like any other person in that classification, she becomes subject to all

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[17] In VII Bull JAG, Sept. 1948, p. 126, the following appears:

"In those cases, however, where a civilian has been held to have been 'accompanying' the armies of the United States, it appeared that he had either moved with a military operation or that his presence within a military installation or theater was not merely incidental but was connected with or dependent upon the activities of the armies or their personnel. He must, in order to come within this class of persons subject to military law, 'accompany' the military service in fact. Although a person accompanying the armies may be 'serving with' them as well, the distinction is an important one, for even though a civilian's contract with the Government may have come to an end before he has committed an offense, so that it may be said he is no longer 'serving with' the armies, jurisdiction may remain on the ground that he is accompanying the armies because of his continued connection with a military community. *Perlstein* v. *U. S.*, 151 Fed. (2nd) 167, IV Bull JAG 462; *In re Di Bartolo*, 50 Fed. Supp. 929, II Bull JAG 338; *Grewe* v. *France*, 75 Fed. Supp. 433, VII Bull JAG 70."

the provisions of the Articles of War and subject to trial by courts-martial *exclusively* for offenses prescribed in said Articles. (See Point II.) On the other hand, if Petitioner does not fall within the provisions of Article of War 2, then, only the question of the legality of the Allied High Commission Court and of its proceedings are open for consideration (*In re Yamashita*, 327 U. S. 1). A concrete ruling as to her status is therefore of primary importance to her and to the thousands of other wives and families who accompany their soldier husbands in far-off lands. Petitioner contends that she falls within the protective mantle of the Articles of War and may not be defranchised of Constitutional and statutory safeguards, as ruled below.

By Article of War 92 Congress has defined the offense and prescribed the punishment for wrongfully killing another. The *Manual for Courts Martial, 1949*, which was promulgated by virtue of authority granted the President by the Congress of the United States in Article of War 38, describes in paragraph 179, the offense of murder and amplifies the provisions of Article of War 92.

A mere reading of paragraph 179 of the *Manual for Courts Martial* will indicate that the character of the offense of murder as understood in military law is different from that described by the German Criminal Code under which the Petitioner was tried. In fact, Section 211 of the German Criminal Code, which it is alleged the Petitioner violated, is so loosely drawn and so difficult to understand, that the British, German and American authorities have had considerable difficulty ascertaining exactly what it does mean. (See U. S. Mil. Govt. Court Reports, opinion No. 70 in case Number 88; No. 19 in case Number 52; and No. 317 in case Number 428.)

Articles of War 4 and 5 prescribe the composition of the courts-martial, authorized to try persons subject to military law. Article of War 8 lists the persons who may appoint courts-martial. Other Articles of War define the offenses and prescribe the procedure. The *Manual for*

Courts Martial, 1949, Chapters 2-28, discusses the jurisdiction of the courts-martial, its creation, procedure, evidence, punishment and review. Chapter 25 of the Manual outlines the procedure to be followed in the event sanity becomes an issue (the mental state of the accused was an issue in this case). Thus we have a situation where Congress has prescribed the classification of persons that may be tried by courts-martial; the character of offenses for which they may be tried; the composition, jurisdiction and procedure of courts-martial, both original and appellate; the substantive law and applicable rules of evidence; the method of review, etc. Nevertheless, despite the existence of these carefully enacted laws, this Petitioner, who fell within its orbit, was tried by other means. She was tried for a violation of a foreign code, by three civilians, who were acting pursuant to rules decreed by themselves or their superiors, and who, it is now claimed, were not required to apply any of the rules prescribed by Congress for the trial of any of the cases before them. This Honorable Court and the District Courts have ruled otherwise.[18]

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[18] The power to define and punish offenses against the sovereignty of the United States is vested exclusively in the Congress, *Koth* v. *U. S.*, 16 F. 2d 59. If the Congress has not declared an act to be a crime against the United States then no American tribunal has the power to treat it as such (*U. S.* v. *Reese,* 92 U. S. 214), as the only offenses against the United States are those declared by the Congress (*U. S.* v. *Grossman,* 1 F. 2d 941; *U. S.* v. *Flores,* 289 U. S. 137). The congressional power to define and punish crimes may not be delegated to the Executive or Judicial branches of the Government in either war or peace time. (*U. S.* v. *L. Cohen Grocery Co.,* 255 U. S. 81). This is equally true of military crimes. Offenses against the Laws of War are, of course, in a different category and may be punished even though Congress has not acted. (*Ex parte Quirin, supra*). A violation of the Laws of War is not charged here, nor are the Common Laws of War in any way involved. Here a violation of a specific foreign law was charged. Under elementary rules of law, one sovereign power may not enforce the criminal laws of another sovereign against its own citizens. (*The People* v. *Price,* 250 Ill. 109; *Marshall* v. *Sherman,* 148 N. Y. 9; *Rose* v. *Himley,* 2 U. S. 87; *Leftridge* v. *Western Union Telephone Co.,* 210 S. W. 18; *Levine* v. *State,* 110 N. J. L. 467; *Commonwealth* v. *O'Keefe,* 298 Pa. 169; *United States* v. *Adams,* 26 F. 2d 141; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99; *The Antelope,* 6 U. S. 337.)

Counsel contends that a serious and dangerous precedent has been set and that, unless this Court acts, the path on which we are being led first by the military and now by the State Department is fraught with danger.

It is the contention of the Petitioner that under the Constitution and laws of the United States she was to be tried pursuant to the provisions of the Articles of War and the Manual for Courts Martial for the substantive offenses defined in the said Articles, and that she was entitled to all the safeguards which those laws afforded her. It is also her contention that the jurisdiction of courts-martial was exclusive—a subject matter discussed in Point II—but that even if it were not exclusive, that she was nevertheless not legally and properly tried—a subject discussed in Points III and IV.

The Respondent's contention, in brief, seems to be that the military authorities and the State Department officials are not bound by the Articles of War and the Manual for Courts Martial because of the provisions of Article of War 15, and that they were free to invoke any system of law to try Petitioner—an American citizen.

Article of War 15 gave them no such power.

POINT II

General courts-martial have *exclusive* jurisdiction over all persons subject to military law for offenses enumerated in the Articles of War when such offenses are committed outside the territorial limits of the United States.[19]

In *Ex parte Gerlach,* 247 F. 616, decided in 1917, the Court (Augustus N. Hand) said:

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[19] Except for violations of Articles of War 80, 81 and 82, in which cases, courts-martial and military commissions have concurrent jurisdiction, such concurrent jurisdiction exists only because Congress has so declared in the Articles of War themselves.

Within the United States, of course, our State and Federal courts have concurrent jurisdiction with that of courts-martial (Manual for Courts-Martial, 1949, par. 11; *Caldwell* v. *Parker,* 252 U. S. 376).

"The section of the Articles of War *subjecting persons accompanying armies* to military authority not only enables military officers to preserve order on the part of such persons, but also in the cases that it covers to call on them for assistance and direct their action while they are properly in the field of military operations. *The court-martial, therefore, had exclusive jurisdiction by the terms of the Articles of War over this man,* who not only accompanied the army, but volunteered to serve, unless the Act of Congress, which adopted the Articles of War, is unconstitutional." (Italics supplied.) (pp. 617-618)

In *Coleman* v. *Tennessee,* 97 U. S. 509, it appears from the facts that one Coleman, who was in the military service of the United States, committed murder while the northern armies were in occupation of Tennessee. He was tried before courts-martial and convicted. Because the sentence was not carried into execution, he was brought to trial a second time for a violation of the Tennessee law and again convicted. He contended that the second trial constituted double jeopardy. A writ of habeas corpus was issued, and this Court sustained the writ, not on the ground of double jeopardy, but on the ground that courts-martial jurisdiction was exclusive and that persons amenable to military jurisdiction were not subject to the law of the occupied territory. Mr. Justice Field, writing for this Honorable Court, stated:

"* * * when the armies of the United States were in the enemy's country, the military tribunals mentioned had, under the laws of war, and the authority conferred by the section named, exclusive jurisdiction to try and punish offenses of every grade committed by persons in the military service. Officers and soldiers of the armies of the Union were not subject during the war to the laws of the enemy, or amenable to his tribunals for offenses committed by them. They were answerable only to their own government, and only by its laws, as enforced by its armies, could they be punished * * *" (p. 515).

"In other words, the municipal laws of the State, and their administration, remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent (Halleck, Int. Law, c. 33)."

"This doctrine does not affect, in any respect, the exclusive character of the jurisdiction of the military tribunals over the officers and soldiers of the army of the United States in Tennessee during the war; for, as already said, they were not subject to the laws nor amenable to the tribunals of the hostile country. The laws of the State for the punishment of crime were continued in force only for the protection and benefit of its own people" (pp. 517-18).[20]

The opinion of Mr. Justice Field was concurred in by the entire Court except Mr. Justice Clifford, who was of the opinion that double jeopardy alone was involved.

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[20] Continuing, Mr. Justice Field, in the *Coleman* case, said:

"In thus holding, we do not call in question the correctness of the general doctrine asserted by the Supreme Court of Tennessee, that the same act may, in some instances, be an offence against two governments, and that the transgressor may be held liable to punishment by both when the punishment is of such a character that it can be twice inflicted, or by either of the two governments if the punishment, from its nature, can be only once suffered. It may well be that the satisfaction which the transgressor makes for the violated law of the United States is no atonement for the violated law of Tennessee. But here there is no case presented for the application of the doctrine. The laws of Tennessee with regard to offences and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States and subject to the articles of war. He was responsible for his conduct to the laws of his own government only as enforced by the commander of its army in that State, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offence, he might have been subjected to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare. But the courts of the State, whose regular government was superseded, and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him." (pp. 518-19)

Later opinions indicate that the dissenter was in error (*Grafton* v. *U. S.*, 206 U. S. 333).

In the *Ybarbo* case hereinabove referred to, Justice Clark commented as follows: "That part of the opinion of the Court (the United States Supreme Court in the *Coleman* case) dealing with courts martial jurisdiction is *dictum.*" This was said by the justice despite the fact that the *Coleman* case has been cited with approval by later opinions of this Honorable Court, the Circuit Courts, and by many eminent writers on the subject. See *State of Tennessee* v. *Hibdom*, 23 F. 795; *Caldwell* v. *Parker*, 252 U. S. 376; *Tucker* v. *Alexandroff*, 183 U. S. 424; *Hamilton* v. *McClaughry*, 136 F. 445; *Anderson* v. *Crawford*, 265 F. 504; *Kahn* v. *Anderson*, 255 U. S. 1; *Ex parte King*, 246 F. 868; *Ex parte Duncan*, 66 F. Supp. 976; *Sugar Estates' Co.* v. *U. S.*, 39 Ct. Cls. 225; *U. S.* v. *McBratney*, 104 U. S. 621; *Ex parte Mason*, 105 U. S. 696.

As is demonstrated in Points III and IV, Article of War 15 did not change the rule of the *Coleman* case, nor was Article of War 15 intended to modify or alter the time-honored and universally recognized principle that the personnel of an invading army is subject to the exclusive jurisdiction of its own country's miltary laws when in occupied territory.

Following the *Coleman* case, this Court had occasion to pass on the same question in *Dow* v. *Johnson*, 100 U. S. 158. The same principles were adhered to. In the *Dow* case, at p. 165, this Court said:

> "When, therefore, our armies marched into the country which acknowledged the authority of the Confederate government, that is, into the enemy's country, their officers and soldiers were not subject to its laws, nor amenable to its tribunals for their acts. They were subject only to their own government, and only by its laws, administered by its authority, could they be called to account. As was observed in the recent case of *Coleman* v. *Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and

criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*, reported in the 7th of Cranch. Much more must this exemption prevail where a hostile army invades an enemy's country."

Continuing at p. 170, this Court said:

"The question here is, What is the law which governs an army invading an enemy's country? It is not the civil law of the invaded country; it is not the civil law of the conquering country: it is military law—the law of war—and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

If, as was contended by Respondent, the military government courts and their successor tribunals, the Allied High Commission Courts, were substitutes for the local courts, which were suspended during the period of our occupation, then our tribunal functioned in the capacity of local courts. Local courts may not enforce its law against the members of an invading or occupying army.[21]

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[21] This Honorable Court, in *Dow v. Johnson*, has this to say on that subject:

"There would be something singularly absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country it had invaded. The same reasons for his exemption from criminal prosecution apply to civil proceedings. There would be as much incongruity, and as little likelihood of freedom from the irritations of the war, in civil as in criminal proceedings prosecuted during its continuance. In both instances, from the very nature of war, the tribunals of the enemy must be without jurisdiction to sit in judgment upon the military conduct of the officers and soldiers of the invading army. It is difficult to reason upon a proposition so manifest; its correctness is evident upon its bare announcement, and no additional force can be given to it by any amount of statement as to the proper conduct of war. It is manifest that if officers or soldiers of the army could be required to leave their posts and troops, upon the summons of every local tribunal, on pain of a judgment by default against them, which at the termination of hostilities could be enforced by suit in their own States, the efficiency of the army as a hostile force would be utterly destroyed." (p. 165)

Commenting on the *Dow* v. *Johnson* case, Mr. Justice Clark, in the *Ybarbo* case, p. 223, had this to say: "The Supreme Court, by the same Justice Field, upheld the lower court in dismissing the action and as in the previous case (*Coleman* v. *Tennessee*), fought the war again by declaring that all members of the occupying Union Armies were exempt from the jurisdiction of the local civil courts. It is quite apparent that the defense the learned Justice relied upon was not needed. * * * So again the learned Justice indulges in *obiter dictum*, * * *"

Despite the criticism leveled against Mr. Justice Field and the rulings of this Honorable Court, the *Coleman* and *Dow* cases state the law which accords with an opinion of Chief Justice Marshall in *The Exchange* v. *McFaddon*, 11 U. S. 116, decided about sixty-five years earlier and many cases decided later.

Winthrop, in his work on *Military Law and Precedents*, 2nd Ed., 1920 Rep., at pp. 81-82, cites the case of *Coleman* v. *Tennessee* with approval, and points out that under international law the Articles of War which govern our military forces as a separate community are applicable extra-territorially. All writers on international law agree with the holding in the *Coleman* v. *Tennessee* case, that the personnel of an army of occupation is exempt from the civil and criminal jurisdiction of the place occupied or which they pass through with the consent of the sovereign power of the area. Chief Justice Marshall expressed the principle in *The Exchange* v. *McFaddon*, at p. 138, thus: that the sovereign "is understood to cede a portion of his territorial jurisdiction, where he allows the troops of a foreign prince to pass through his dominions."[22]

If the personnel of the army are exempt from the civil and criminal jurisdiction of an area which they enter with

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[22] See also: Wheaton, *Elements of International Law*, 1929 Ed., Sec. 95, p. 231; Hyde, *International Law*, Vol. 1, Sec. 247; Oppenheim, *International Law*, Vol. 1, 4th Ed., Sec. 145; Hall, *International Law*, Sec. 56; Lawrence, *Principles of International Law*, Sec. 107, p. 246; Fraenkel, *Military Occupation and Rule of Law*, 1944 Ed., p. 66; Moore, *International Law Digest*, 1906 Ed., Vol. II, Sec. 251.

consent, it follows that they are likewise exempt from the civil and criminal jurisdiction of an area which they conquer. This principle is taught in the United States Military Academy at West Point. See *Constitutional Powers and Limitations*, 2nd Ed., pub. by Dept. of Law of the U. S. Military Academy, 1947. It is therein stated:

> "* * * all members of the United States Army are subject to the jurisdiction of its court-martial. Yet, while the army is within territorial limits of the United States the civil courts, both Federal and State, have certain *concurrent* jurisdiction over its members * * * However, the jurisdiction of courts-martial becomes *exclusive* when the Army leaves its own territorial limits, as for instance, when the Army marches through a *friendly country* or is stationed therein. In such cases, consent of the friendly government for exemption from its civil and criminal jurisdiction is assumed as a matter of course; should it deny this consent and act otherwise, it would give rise to serious consequences. Since this is the rule in regard to *friendly territory, it should be clear, a fortiori (for a stronger reason), that when the Army invades or occupies enemy territory it is wholly exempt from the jurisdiction of that country's courts.*"

In *Hamilton* v. *McClaughry*, 136 F. 445, at p. 448, the Court said:

> "Under the well-settled principles of law the offenders so tried were not amenable to the laws of the government of China, and the offenses by them committed, if any, whether by the laws of this country denominated as the crime of murder, robbery, larceny, or other felony, were not committed in violation of any law of China, because done by persons in the military service of this country while stationed in China."

Brig. Gen. Betts, the theatre Judge Advocate for the European Command (1945-6), and formerly Professor of Law in the U. S. Military Academy, said in an article appearing in Vol. IV, Federal Bar Association Journal, at p. 27:

> "This jurisdiction of a military government, so far as concerns its punitive application by military tribunal, is exercised through military commissions and provost courts. * * * In practice, offenders in such occupied territory who are not subject to the Articles of War, but who by the Laws of War are subject to trial by military tribunal, are tried by military commissions or provost courts. * * * Such tribunals exercise no civil jurisdiction, only criminal jurisdiction over violators of the Laws of War and for crimes against the civil laws being enforced by the occupying Army, by offenders not subject to the Articles of War. *All such as are liable to the Articles of War remain subject to the exclusive jurisdiction of courts-martial for violations thereof.*" (Emphasis added.)

If, as appears from the above, substantive and procedural law governing the military establishment, is alone applicable when our Army is in foreign territory, by what authority was this Petitioner made amenable to the local substantive law and denied trial by courts-martial as prescribed by the Articles of War? We are not here confronted with a case where an offense was committed by a person subject to military law within the territorial bounds of the United States. In such a case, there is no doubt but that both the military and civil authorities exercise concurrent jurisdiction. (*Caldwell* v. *Parker,* 252 U. S. 376.)

In 1863, in a book entitled "The Judge Advocate's *Vade Mecum,*" the author, Col. C. H. Lee, said in Sec. 12:

> "In the exercise of this power, Congress has itself ordained a military code, in the Rules and Articles of War, which each officer of the Army is required to subscribe. The President, as Commander-in-Chief of the Army and Navy, is the executive who is to administer this code. He can neither add to, nor take from it; and though he is authorized by the laws to make rules and regulations for both Army and Navy, they cannot be inconsistent with the fundamental law of the land, or with what may be called the groundwork of our military law, as expressed in the Articles of War; *neither*

can he 'ordain any penalty, or military crime not expressly declared by Act of Congress.'" (Emphasis added.)

If the President of the United States could not declare as a punishable offense, a crime not expressly declared to be such by Congress, his subordinate officers were likewise without power to do so, and any attempt by General Clay or Mr. McCloy to decree the provisions of the German Criminal Code applicable to this Petitioner, who was a person subject to military law, is null and void. This is so, aside from the question as to whether she could be tried by any military tribunal other than courts-martial (*United States* v. *Symonds,* 120 U. S. 46, 49-50).

Congress, within the field expressly and exclusively reserved to it, enacted the Articles of War which deal, not only with the substantive offenses, but with the modes of procedure to be followed in cases involving military personnel—soldiers, officers, persons serving with the army, persons accompanying the army, etc. Within the territorial limits of the United States, concurrent jurisdiction over offenses is sometimes exercised by local State or Federal courts (*Caldwell* v. *Parker, supra; People* v. *Denman,* 177 P. 461). When outside the territorial limits of the United States, that law (the Articles of War) becomes exclusive whether our armed forces be in occupation of an enemy territory or stationed in friendly foreign territory (*Coleman* v. *Tennessee, supra*).

Being exclusive, the attempt *to make this Petitioner amenable to a foreign law* which she could not read or understand and which no American lawyer, after careful study, could completely understand, *and to subject her to trial before an occupation court* regardless of the name by which it was called, is violative of the Constitution and laws of this country and therefore null and void.

POINT III

Article of War 15 did not grant power to try "persons subject to military law" before a military commission for any offense specifically made punishable by the Articles of War, except as provided in Articles of War 80, 81 and 82.[23]

The history, jurisdiction, functions, procedure, etc., of military commissions are set forth in Winthrop's *Military Law and Precedents*, 2nd Ed., 1920 Rep., pp. 831-862. In brief, the military court which came to be known as a military commission was first ordered by General Scott during the Mexican War (Order No. 20, 19 Feb. 1847). The occasion was the fact that jurisdiction in courts-martial proper was restricted almost exclusively to military personnel and to specific offenses enumerated in the Articles of War. Courts-martial jurisdiction did not extend to criminal acts of the inhabitants of the occupied territory, nor did it extend to that class of crimes against the Laws of War which today are generally referred to as "war crimes." A separate war court was necessary and is authorized as a proper agency of the Constitutional power to wage war. (*The Grapeshot*, 76 U. S. 129; *Leitensdorfer* v. *Webb*, 61 U. S. 176.) Such courts may be called by any name. (*State* v. *Hall*, 65 Tenn. 3.)[24]

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[23] This argument is predicated upon the assumption that the tribunal which tried Petitioner was a military commission or other military tribunal within the meaning of Article of War 15. Under Point IV we shall demonstrate that it was neither a military commission nor other military tribunal, but a self-ordained body not properly created and wholly devoid of jurisdiction over either the person or the offense charged, and that it functioned without due process of law and in utter disregard of congressional mandates.

[24] Such war courts have been called Provisional Courts, Provost Courts, Military Tribunals, Special Courts-Martial, Occupation Courts, Courts of Inquiry, Superior Military Courts, Military Government Courts, Council of War, Board of Officers, and by other names—but all fall within the general term "Military Commission".

The jurisdiction of the early military commissions, in general, extended to persons in occupied territory who committed ordinary

The jurisdiction of military commissions, generally speaking, extended to all persons within the occupied territory, except those persons who were subject to the military law of the occupant. In two instances, however, even persons subject to the military law of the occupant were amenable to its jurisdiction, one, for offenses which constituted a violation of the Laws of War, i.e., spying, pilferage, aiding the enemy, abusing a prisoner, etc.; two, when jurisdiction was specifically conferred on it by statute, such as the Enrollment Act of 1863 (since repealed) or Articles of War 80, 81 and 82. In so far as the inhabitants of the occupied area were concerned, jurisdiction over them extended to all criminal violations of the duly issued orders of the military commander, to all violations of the Laws of War and to all violations of the local criminal laws, committed during the time of actual military occupancy.[25]

Persons subject to the Articles of War, accused of a wrong declared to be a punishable offense in any one of the Articles of War, were not and are not subject to trial by military commission except as noted in the paragraph above. (See collation of decisions in Dig. Op. Jag. 1912,

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crimes, assault, larceny, etc., as distinguished from crimes "in violation of the laws of war. A separate tribunal designated "Council of War" was inaugurated by General Scott to try the latter class of offenses. "The Council of War" differed from a military commission in respect to the class of cases referred to it. It was a short-lived institution and but few proceedings were tried before it, involving in the main guerrilla warfare (then regarded as illegal), enticing soldiers to desert the service of the United States, etc. The charges were labeled as being "in violation of the laws of war".

During the Civil War, the jurisdiction of the military commission was by practice extended to include offenses against the laws of war (war crimes) and the "Council of War Court" passed out of existence.

[25] War Dept. Basic Field Manual, F. M. 27-5, par. 25a, 22 Dec. 1943; Winthrop, *Military Law and Precedents, supra*, pp. 831-862; *Ex parte Quirin, supra*, p. 31; Fairman, *Law of Martial Rule*, pp. 272, 184 et seq. and cases there cited; Cowan, *The Military Commission*, 29 Va. L. R. 317; *Digest of Opinions of the Judge Advocate General*, 1912, pp. 1062-1072.

pp. 1069-70, some of which are more fully reported in the footnote below.) [26]

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[26] In 7 Records, Judge Advocate General, at p. 440, the Judge Advocate General wrote: "J.A.G. Office, April 5, 1864. 1. Respectfully returned to Major General Banks and his attention invited to the 65th Article of War and Paragraph 896, Army Regulations. Attention is also invited to the fact that *under the first charge an offense is alleged of which a military commission had not jurisdiction, it being a crime denounced in the Articles of War triable by a general courts martial. The proceedings so far as they relate to this charge therefore should be disapproved.* * * * J. Holt, J.A.G."

In 1 Records, J. A. G. at p. 468, Dec. 20, 1862, the following appears: "The offence for which this officer was tried was a clear violation of the 52nd Article of War, of which a General Court Martial would have had jurisdiction. * * * *A military commission had no power to* dismiss him from the Service, nor to *try him for a purely military offense, defined in the Articles of War.* * * * J. Holt, Judge Advocate General."

In 9 Records, J. A. G., at p. 236, the following appears: "These prisoners (American soldiers) were tried by Military Commission. The proceedings were irregular. *Offenses denounced by the 52nd Article of War (abandoning post, misbehaving, plunder, pillage, etc.) should be tried by General Court Martial. The records were returned to General Banks April 17, 1864, with a suggestion that, if deemed necessary, the men could be brought to trial before the proper tribunal.*"

In 7 Records, J. A. G., at p. 486: "J. A. G. Office, April 7, 1864. Respectfully returned to M. G. Banks. *The offense*—absenting himself from his post for the purpose of pillage and plunder—of which the prisoner in this instance was convicted, *is one which the 52nd Article of War expressly provides shall be punished by the sentence of a general courts-martial, and there being no law bringing it within the jurisdiction of a military commission, it must be held that the proceedings in this case were illegal, and that the sentence pronounced is void.* If it is considered that this man should not escape punishment, he may be brought to trial before a proper tribunal for the same offense of which he was found guilty by the military commission. J. Holt, J. A. G."

The following decision, which appears in 15 Records of the J. A. G., p. 373, reiterates the rule that a military commission had no jurisdiction over a person in our military service to try for an offense which was not by statute made specifically triable before it. "War Department, Bureau of Military Justice, June 16, 1865. Respectfully returned to Major General Ord, Commanding Department of Virginia, or his successor. *The within named officer is tried by military commission on the charge of 'conniving at robbery' and 'conduct prejudicial to good order and military discipline'* and

In the Courts below, Respondent admitted that a Military Commission *would not have jurisdiction* over a person subject to military law if the offense charged were labeled as a "violation of the Articles of War." (Resp. Reply Brief, U. S. Dist. Court, p. 4.) The Respondent then urged that if the authorities chose to charge "a violation of the local law," in cases where the act also violated local law, then the Military Commission *does have jurisdiction.*

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sentenced to forfeiture of two months' pay. The Act of March 3, 1863, section 30 [since repealed], provides for the trial by military commissions or courts martial of certain specified offenses, including robbery, but not specifying the alleged offense of *connivance* at robbery. *The charge of conduct prejudicial to good order and military discipline is triable only by courts martial. It is concluded, therefore, that in the present case, the tribunal before which the accused was tried, was without legal jurisdiction and that the proceedings are consequently improper and should be set aside.* W. W. Winthrop, Major and J. A., in absence of J. A. G."

In Vol. 7, Records, J. A. G., p. 418, General Holt wrote General Carleton, among other things, that Benets Military Law contained a concise summary of the powers of military commissions. He said: "J. A. G. Office, March 31, 1864. Brigadier General James H. Carleton, General, In reply to your letter of the second instant, etc. * * * At pages 14, 15 and 16 of Benets Military Law, edition 1862, you will find a concise summary of the powers which military commissions are regarded as competent to exercise. Very respectfully, J. Holt, J. A. G."

The material parts of Benets Treatise on Military Law (1862) read: "In carrying on war in a portion of country occupied or threatened to be attacked by an enemy, whether within or without the territory of the United States, crimes and military offenses are frequently committed, which are not triable or punishable by courts-martial, and which are not within the jurisdiction of any existing civil courts. Such cases, however, must be investigated, and the guilty parties punished. * * * This is usually done by courts-martial; but in our country these courts have a very limited jurisdiction, both in regard to persons and offenses. Many classes of persons cannot be arraigned before such courts for any offense whatever, and many crimes committed, even by military officers, enlisted men, and camp retainers, cannot be tried under the 'Rules and Articles of War.' *Military commissions should be resorted to for such cases, and these commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.*" (Italics supplied.)

In other words, the choice made and the label employed are the determining factors. It is common knowledge that every major offense, defined in the Articles of War, is also an offense against the local laws of all countries. Respondent's theory is novel, to say the least, but certainly devoid of merit. The label employed by the military authorities seems a very thin basis for snatching jurisdiction over an American citizen "subject to military law", from the duly constituted courts-martial, with all its safeguards, and transfer same to a tribunal which functions entirely according to the will of one man.

The language of Article of War 15 on its face indicates that concurrent jurisdiction was *not* vested in the military commission with respect to any and all offenses nor with respect to any and all offenders, but only with respect to such *offenders and offenses "that by statute or the law of war"* were triable before such military commissions at the time of the enactment.

Article of War 15, first enacted in the 1916 Code, authorized concurrent jurisdiction "in respect of offenders or offenses that by *the law of war* may be lawfully triable by such military commissions," etc. The words "by statute or" were added in the 1920 Code, and the word "lawfully" appearing before "triable" was omitted. Other than these changes, the language used in the 1916 and 1920 Codes is identical. Brig. Gen. Enoch J. Crowder, the Judge Advocate General, testifying before the Armed Services Committee in 1916, explained the meaning and purpose of the enactment. Nothing that he said can be construed to grant the powers sought to be exercised in this case or authorize the procedure here employed.[27]

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[27] General Crowder said: "Sub-heading (d) of Article 2, which corresponds to Article 63 of the existing Code, introduces the words 'all persons accompanying' so as to make subject to the Article a class of persons who do not fall under the designations 'retainers to the camp' and 'persons serving with the Armies in the field,' etc. * * * The purpose is to give full disciplinary authority over these three classes of persons when the Army may be in peaceful transit

It will be noted that General Crowder stated specifically that, *"It* (Article of War 15) just saves to these war courts *the jurisdiction they now have,"* and that, *"Both classes of courts have the same procedure"*—this latter sentence was

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through a foreign country, or where, as in Cuba in 1906, there is intervention in a foreign country falling short of war. * * *

"In the present condition of our Articles of War 'retainers to the camp' (i.e., officers, servants, newspaper correspondents, telegraph operators, etc.), and 'persons serving with the Armies in the field' (i.e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theatre of military operations. *A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjugation to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the Article has been expanded to include also persons accompanying the Army.* The existing Articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and *where it is contrary to international policy to subject such persons to the local jurisdiction,* or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances. * * *

"Article 15 is new. We have included in Article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our criminal law war court. It has no statutory existence, though it is recognized by statute law. *As long as the Articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by courts-martial, I was afraid that, having made a special provision for their trial by courts-martial, it might be held that the provision operated to exclude trials by military commissions and other war courts;* so this new Article was introduced: (quotes Article of War 15).

"It just saves to these war courts the jurisdiction they now *have,* and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. *Both classes of courts have the same procedure"* (Sen. Bill S-3191, 64th Cong., 1st Sess., Rep. No. 130, Feb. 7, 1916. See also note 31, 327 U. S. 1, 65). (Italics supplied.)

omitted by the Court below in its quotation of General Crowder's testimony, probably because it was also omitted in the Respondent's Brief. It is, however, a revealing and most important sentence. It indicates that General Crowder did not intend to leave to the commander in the field, or to any other person, such as was done in this case, the power to deprive a citizen of his right to be tried according to the standards prescribed by Congress in the Articles of War.[28]

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[28] Congress, at the time of its enactment of Article of War 15, also enacted other Articles obviously designed to making procedure before courts-martial and military commissions practically the same. By Article of War 38 it directed that "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States. * * *" Pursuant to such power, the President said in paragraph 2 of the 1928 Manual for Courts Martial, and again in the 1949 edition, that *military commissions* so far as not otherwise provided, "have been usually guided by the applicable rules of procedure and evidence prescribed for courts-martial."

Congress, by its enactment of Article of War 24, specifically directed that "No witness before a military court, commission, * * * shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, * * *." Not only was this rule not followed in the courts established in Germany, but the rules of practice and procedure "generally recognized in the trial of criminal cases in the district courts of the United States," as provided for by Article of War 38, were likewise not followed. See statement of Gen. Joseph T. McNarney, Commanding General of U. S. Forces in Europe, dated December 6, 1946 JAGJ 1946/7691, wherein he said:

"Under the existing military government ordinances and regulations, military government tribunals lack many of our recognized Constitutional guarantees and procedural safeguards which are preserved in court-martial proceedings. * * * The rules of procedure are based to a considerable extent on Continental legal practice, rather than upon concepts accepted as American. At present there is no protection afforded an accused under these rules against self-incrimination, and a military government court could draw unfavorable inferences from an accused's refusal to answer. There are at present no rules prohibiting the introduction of hearsay evidence. It is believed that the trial of American civilian dependents by mili-

To determine the extent of the jurisdiction reserved to military commissions by Article of War 15, it is necessary to ascertain the extent of their jurisdiction at the time of the enactment of said Article and not the extent of their jurisdiction at any other time. General Crowder's statement obviously refers to the jurisdiction authorized to be exercised by military commissions in the year 1916 when Article of War 15 was enacted, and not the jurisdiction which was authorized pursuant to the Enrollment Act of 1863, which Congress later repealed.

During the Civil War, many cases were tried by military commissions because jurisdiction was vested in them by statute—the Enrollment Act of 1863. By that Act, both courts-martial and military commissions were granted concurrent jurisdiction to try even persons subject to mili-

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tary government courts without such guarantees and safeguards would certainly be most productive of criticism."

By its enactment of Article of War 47c, Congress directed that before the appointing authority acted upon a record of a general court-martial or *military commission*, such record of trial be referred to his Staff Judge Advocate or the Judge Advocate General for review and advice, etc. It is obvious that Congress intended that the appointing authority of a military commission be the same person who is authorized to appoint general courts-martial pursuant to the provisions of Article of War 8, and it was so held in *In re Yamashita*, 327 U. S. 1.

If by any interpretation of Article of War 15, Mr. McCloy was not bound by the statutory enactments of Congress, then it is respectfully contended that the said Article is unconstitutional as denying to Petitioner due process of law in violation of the Fifth Amendment and in violation of Article I, Sec. 8, Clause 14, which vests in Congress alone the power "to make rules for the government and regulation of the land and naval forces". Such interpretation of Article of War 15 likewise denies to Petitioner the equal protection of the laws, since she was not permitted a trial or appeal as directed by Congress in the Articles of War (*Dowd* v. *U. S.*, 340 U. S. 206).

What Congress actually enacted was, presumably, predicated in part upon what General Crowder stated. Nothing in what he stated, and nothing that appears in the language of Article of War 15 itself, indicates an intent to substitute the will of the commanding general for the will of Congress and there was no discretion in anyone to deviate from the laws which were enacted by Congress (*U. S.* v. *Symonds*, 120 U. S. 46, 49).

tary law for specified major criminal offenses such as murder, rape, larceny, etc. With the repeal of the Enrollment Act of 1863, *such jurisdiction was denied military commissions* but not courts-martial. In 1874 Congress re-enacted the provisions of the Enrollment Act of 1863 with but a single material exception—the words "military commission" were omitted and jurisdiction was vested exclusively in courts-martial (Winthrop, p. 667). In footnote 15 on p. 667, Col. Winthrop states that this change, i.e., the omission of the words "military commission," was proper "* * * *for the reason that a military commission is not the appropriate tribunal for the trial of military persons.*" It thus appears that the Congressional intent was to deny jurisdiction to military commissions in cases cognizable by the Articles of War unless there was a specific reservation such as is reserved in Articles of War 80, 81 and 82.

The language of Articles of War 92 and 93, which in Winthrop's time was Article of War 58, enacted in the year 1874, indicates on its face that Congress conferred *exclusive* jurisdiction in courts-martial to try a number of major offenses, including murder, committed by persons subject to military law. No other interpretation can be placed on the language used, particularly in the light of the fact that Congress omitted the words "military commissions" which had been authorized as an appropriate tribunal, for such trials, in earlier enactments (Winthrop, pp. 666-667).[29]

It is significant to note that subsequent to 1874, no person subject to military law, as far as counsel has been able

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[29] In *Ver Mehren v. Sirmyer*, 36 F. 2d 876, 881, the Court said: "* * * Necessary steps required to be taken in a prescribed way could not be taken in some other way: a fortiori, they could not be totally omitted. This is elementary law, and was concisely stated in Raleigh, etc., R. Co. v. Reid, 13 Wall 269, 270: 'When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode'."

In *Johnson* v. *United States*, 225 U. S. 405, and in *Brewster* v. *Gage*, 280 U. S. 327, it was held that a change in phraseology indicates persuasively that a departure from the old law was in-

to ascertain, was brought to trial before a military commission for an offense cognizable by the Articles of War until the end of World War II. During World War I, and the subsequent occupation, none were so tried (Am. Mil. T. Gov't of Occupied Germany 1918-20, Vol. IV, p. 50).[30]

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[30] In the *Ybarbo* case, *supra*, p. 220, it was said: "When the Articles of War were revised in 1874, the words specifically conferring jurisdiction on military commissions were omitted. This omission caused some authorities to believe that subsequent to 1874 a military commission was not an appropriate tribunal for the trial of military persons." The Justice then concludes, p. 221, "When Congress enacted the present Article of War 15 it would seem that it did so with full knowledge that it was saving to Military Commissions the jurisdiction it had theretofore exercised over soldiers as well as civilians under the Law of War. It had the same effect as though the Enrollment Act of 1863 had been re-enacted." This conclusion is not supported by any authority and is contrary to all well-known principles of statutory construction. The Congress, by its enactment of Article of War 15, continued in military commissions only the jurisdiction which it had in 1916, the time of the enactment. Nothing was said, either expressed or implied, from which an inference may be drawn that any part of the Enrollment Act of 1863 was being re-enacted. As a matter of fact, the language used in Article of War 15 and several other Articles of War indicated just the contrary (compare the language of Articles of War 80, 81 and 82 with that of Articles of War 92 and 93).

Chief Judge Parker, in the Court below, in apparent support of Justice Clark's views, quoted extracts from the *Digest of Opinions of the Judge Advocate General*, 1912, pp. 1056-7, to show that many soldiers and civilians were tried by military commissions. Certainly there were many persons subject to military law, soldiers and civilians alike, who were tried before military commissions during the Civil War period. That was due entirely to the fact that Congress had authorized the use of such tribunals. But when Congress changed the law by its repeal of The Enrollment Act of 1863, and by its enactment of Article of War 58 in 1874 (later changed to Articles of War 92 and 93), it divested military commissions of such jurisdiction and vested it exclusively in courts-martial.

The District Court (Hon. Ben Moore) took the position that Article of War 15 vested concurrent jurisdiction over all crimes of every nature in military commissions regardless of the restrictive language of Article of War 15 itself. He interpreted the words "the law of war" to include offenses of every description. Wholly disregarded were the decisions of this Court in *Ex parte Quirin, supra*, and *In re Yamashita, supra*, which define the words "Laws

Even during the period when the Enrollment Act of 1863 was in force, by the construction given that Act by the military authorities, "persons subject to military law" were not permitted to be tried before military commissions for offenses specifically made punishable in the then-existing Articles of War (Dig. Op. JAG 1912, pp. 1063-72). As hereinabove pointed out, in every case where the exercise of such jurisdiction was attempted, the Judge Advocate General voided the conviction.

In *Digest of Opinions of the Judge Advocate General*, 1912, at pp. 1064-65, the following appears:

> "I C 8 a (2)(a). * * * In the Civil War such courts [military commissions] were not unfrequently constituted and were commonly designated *provost courts*. *R. 2, 14, Feb., 1863; 15, 519, July, 1865. Such courts had no jurisdiction of purely military offenses (i.e., offenses which the Articles of War make cognizable by court-martial)*, and were therefore not properly authorized to impose forfeitures of pay or other strictly military punishments upon officers or soldiers of the Army. *R. 6, 635, Dec. 1864; 8, 638, 10, 39 and 560, 13, 55 and 114, July to Dec. 1864.* These courts

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of War" contrary to Judge Moore's views. Under the construction given Article of War 15 by the District Court, the words used by Congress, namely "in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions," are superfluous. General Crowder's testimony indicates that these words had definite meaning and that Article of War 15 merely reserved to military commissions the jurisdiction which they had in 1916 and not jurisdiction exercised under some theretofore repealed statute.

The jurisdiction of a military commission was not "plenary in scope," as Judge Moore held. A distinction always existed between an offense made punishable by the Articles of War and an offense made punishable by the laws of war. See Dig. Op., JAG 1912, p. 495, case No. III E 3b, where it was said: "As desertion and joining the enemy and taking service with him are two distinct offenses, held that desertion would ordinarily be tried by a general court martial as a violation of the Articles of War, while joining the enemy would be tried by a military commission as a violation of the laws of war." Now by reason of the provisions of Article of War 81, joining the enemy and taking service with him may be tried by either court, but desertion may not be tried by military commissions *because it is not an offense which by statute or by the law of war is made triable by such military commission.*

were in general resorted to as substitutes for the ordinary police courts of cities, and their jurisdiction was in general confined to cases of breaches of the peace and of violation of such civil ordinances or military regulations as might be in force for the government of the locality. *R. 13, 392, Feb. 1865.*"

The Courts below did not give cognizance to much of the language used in Dig. Op., JAG 1912, pp. 1069-70, although partial quotations were taken from this volume. Directly in point on the issue here is the following:

"I C 8 a (3)(c)(3). It is a further restriction upon the jurisdiction of the military commission that, except where it may be invested by statute with a jurisdiction *concurrent* with that of courts-martial (as by secs. 30 and 38 of the act of Mar. 3, 1863), *its authority can not be extended to the trial of offenses which are, specifically or in general terms, made cognizable and punishable by courts-martial by the Articles of War or other statute. In repeated instances during the Civil War the proceedings of military commissions, in cases in which these tribunals had improperly assumed jurisdiction of offenses legally triable by courts-martial only were recommended by the Judge Advocate General to be disapproved. R. 468, 482, Dec., 1862; 7, 440, 486, Apr., 1864; 9, 236, June, 1864; 15, 373, June, 1865; 16, 73, Apr., 1865; 19, 63, Oct., 1865.*" (Italics supplied in part.)

The only statutory jurisdiction which military commissions had over "persons subject to military law," in the year 1916 was in cases involving spies (Dig. Op., JAG 1912, p. 1068, case no. I C 8 2 (3)(b)[3]). At the present time there are two additional offenses, added by statute, for which the military commission may try our military personnel, i.e. aiding the enemy and dealing in captured property (Articles of War 80, 81 and 82). The *Manual for Courts Martial,* 1928, p. 9, cites Articles of War 80-82 as the only examples of offenses which, by statute, are so triable before military commissions. The 1949 Manual for Courts-Martial, p. 11, states substantially the same thing.

The *Ybarbo* case recognized that Article of War 15 did not confer general jurisdiction on military tribunals fully concurrent with that of court-martial, but conferred only limited jurisdiction in respect of certain offenders and offenses which by "statute" or the "law of war" were made so triable. Mr. Justice Clark ruled that a wife who killed her soldier husband in the occupied Zone did *not* violate the law of war. [Judge Moore ruled directly the contrary. The Court of Appeals approved both rulings.] To sustain jurisdiction, therefore, Mr. Justice Clark had to find that the offense for which Mrs. Ybarbo was tried was authorized "by statute" to be tried before a military commission. But there is no statute upon which the learned justice was able to rely to sustain his position. He, therefore, urged at p. 219 as follows: "The draftsmanship of this Article (A. W. 15) is perhaps unfortunate. It does not, as it might, refer specifically to civil crimes, but confines its reference to offenses proscribed by statute or the laws of war. We are not concerned here with the latter as we would have been if the defendant had killed a German national. It is, however, permissible, we think, to interpret the word 'statute' in the sense that by the word is meant any enactment which has the support of paramount authority. In that sense is included not only statutes passed by a United States legislature, but also a German law, adapted by a military governor."[31] The argument that the decree of a military governor is on a par with a Congressional enactment lacks merit because a "statute" is the express written will of the legislature

[31] No reference is made to any document or decree adopting such German law. In fact, no such adoption was ever made. General Clay, as far as counsel has been able to ascertain, never issued any decree which can be interpreted as making German law applicable to the Occupation Forces. General Eisenhower's proclamation continuing German law was directed specifically "to the German people" (R. 103). Furthermore, the Theatre Judge Advocate, European Command, has stated that American dependents while sojourning in Germany do not administratively or legally become merged with the people of Germany (JAGJ 1946/7691, 10 Dec. 1946).

(*Federal Trust Co.* v. *East Hartford Fire Dist.*, 283 F. 95), which, in the United States, means an act of Congress and not a military order.

The earliest known document relating to military commissions is General Order #20, Feb. 19, 1847. It reads in part:

> "* * * that no military commission shall try any case clearly cognizable by any court-martial. * * *"

Such rule was followed for almost 100 years. General Holt, the Judge Advocate General, prevented any deviation therefrom during Civil War days and Petitioner respectfully asks this Honorable Court to prevent present-day deviation, which have been attempted in Europe. The awesome-sounding name given the self-ordained tribunal which tried Petitioner, does not vest it with more power than that heretofore exercised by military commissions, and Article of War 15, by its very terms, did not pretend to enlarge that jurisdiction.

The Rule has recently been stated in Articles of War Annotated, 5th Revised Ed., 1949, by Lee S. Tillotson (Col., JAGD, USA, Ret.), as follows, p. 45:

> "3. Military Commissions have no jurisdiction over civil actions. *Except where they have been invested by statute with a jurisdiction concurrent with courts-martial (as in Articles 80, 81 and 82) their authority cannot be extended to the trial of offenses which are specifically, or in general terms, made punishable by courts-martial by the Articles of War or other statutes* (12-1069, 1070)." (Emphasis added in part.)

War Dept. *Basic Field Manual*, F.M. 27-10, October 1, 1940, entitled "Rules of Land Warfare," par. 7, also stated the general rule as follows: "* * * While general courts martial have concurrent jurisdiction with military commissions and provost courts to try any offender who by the law of war is subject to trial by military tribunals, it has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the

Articles of War as those Articles expressly make punishable by sentence of court martial (except where the military commission is also given express statutory jurisdiction over the offenses (A.W. 80, 81, 82))."

The cases relied upon by Respondent and cited by the Courts below, hold nothing contrary to what is stated hereinabove, and are wholly inapplicable.[32]

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[32] *Mechanics' etc. Bank* v. *Union Bank*, 89 U. S. 276, involved a *civil litigation between enemy nationals* in a military tribunal set up by a military commander in an occupied area, where no governmental functions were being carried on by the deposed sovereignty. Petitioner does not contend that such tribunals may not be set up by competent military authority to adjudicate the rights of enemy nationals or to punish them for criminal offenses. Such is not this case. Furthermore, in the *Mechanics' Bank* case, as the majority opinion points out (p. 297), General Butler, who established the court, "was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except so far as they were denied him by the commander-in-chief, and among these powers, as we have seen, was that of establishing courts in conquered territory". The opinion also points out that since the courts of Louisiana, interpreting a post-war Louisiana statute, held the decision of General Butler's court to be good, *that no federal question was presented on appeal to the United States Supreme Court.* This Court said, "* * * * it is not for us to inquire whether the Provost Court (General Butler's court) acted within its jurisdiction or not. That is a question exclusively for the State tribunals", page 297. The dissenting opinion of Mr. Justice Field discusses the limitations on the jurisdiction of military tribunals thus established.

Santiago v. *Nogueras*, 214 U. S. 260. Here the situation is somewhat similar to that which existed in the *Mechanics' Bank* case. It involved a *civil litigation between foreign subjects in a court created by military authority with the approval of the President at a time when the earlier government of the defeated power was extinct.* No constitutional or statutory right of an American citizen was involved, nor were any of the questions raised here, argued or decided in that case.

The Grapeshot, 76 U. S. 129. By proclamation of President Lincoln, dated October 1860 and later approved by Congress, a provisional court was established in Louisiana during the military occupation of that State. By consent of the parties, a proceeding in admiralty was continued in the tribunal so established. This court pronounced the well-known and oft-repeated general principle that the President of the United States, acting through the military establishment, may create courts in occupied territory to adjudicate

the rights of enemy inhabitants. Nowhere is it said or intimated that the citizens of the victorious belligerent or the personnel of its army are subject to the jurisdiction of such courts. Even though that were permitted under the Enrollment Act of 1863, later congressional enactments indicate conclusively that they were no longer so subject (Amer. Articles of War of 1874, enacted June 22, 1874; The Articles of War Act of 4 June 1920, 41 Stat. 787.

Leitensdorfer et al. v. Webb, 61 U. S. 176, and *Cross et al. v. Harrison*, 57 U. S. 164, add nothing to what has been said hereinabove. *Both cases involved civil litigation in courts set up by the military establishment in a conquered territory.*

Neely v. Henkel, 180 U. S. 109, on which the greatest stress was placed by Respondent, is likewise inapplicable. The case involved the interpretation of an extradition law (Act of June 6, 1900, c. 739, 31 Stat. 656) passed in implementation of foreign extradition treaties. It appears that petitioner, an American citizen who was a public employee of Cuba and a resident there, embezzled substantial funds and property of the Post Office Department in Havana, where he worked. He sought refuge in the United States. Cuba at that time was regarded as a foreign country (Court's Opinion, p. 119). After a full hearing on probable cause, as in such cases made and provided, the embezzler was ordered returned to stand trial in accordance with the law of Cuba. Certainly he had no rights under the Constitution and laws of the United States except insofar as extradition was concerned, all of which rights were extended to him. The gravamen of his petition upon habeas corpus was that the extradition statute was unconstitutional. No question of the legality of the courts, which were established in Cuba pursuant to treaty and congressional enactment, was raised (Opinion, p. 122), nor could it be raised at that stage of the proceeding. Neely, the petitioner, had no connection, directly or indirectly, with our armed forces in Cuba and was properly ordered returned. What relevancy the *Neely* case has to the present one is difficult to understand.

In re Ross, 140 U. S. 453, involved the legality of a trial before a consular court in Japan, established pursuant to treaty and the laws of the United States. As the Opinion in that case points out, it has been the uniform practice of civilized governments, for centuries, even preceding the Middle Ages, to vest their consuls with judicial authority to try their own subjects, for offenses committed by them, in foreign countries (pp. 462-463). That is what was done and the *Ross* case has no bearing, whatsoever, on the issues presently raised.

POINT IV

The United States Court of the Allied High Commission for Germany was not a duly constituted military commission or military tribunal.

The law with respect to the creation and composition of military tribunals is well settled (Winthrop, *supra*, p. 835-842). Unless established and composed in accordance with recognized principles of law, any determination made by it is a nullity. *Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1; *Grafton* v. *U. S.*, 206 U. S. 333; *Runkle* v. *U. S.*, 122 U. S. 543; *Dynes* v. *Hoover*, 61 U. S. 65.

In *In re Yamashita*, 327 U. S. 1, both the majority and dissenting opinions agree, that before a military commission or tribunal may be considered a legal body: (1) it must be created by proper military command; (2) it must be composed of persons lawfully authorized to act; (3) it must function at a time and place where, under the law, it is permitted to function; (4) the charges must be a violation of the laws of war or some specific statute; and (5) in cases involving "persons subject to military law", its proceedings must be in accord with the provisions of the Articles of War. The basic difference between the majority and the dissenting opinions in the *Yamashita* case involved the applicability of the Articles of War to the enemy national involved in that case. Mr. Justice Rutledge, in his dissent, pp. 61-72, argued that the Articles of War applied to all cases tried before military commissions, whereas the majority ruled that the Articles of War applied only to those persons who were classified as being "subject to military law" within the purview of Article of War 2, pp. 18-20).

The tribunal before which Petitioner was tried was neither composed according to law nor did it function in a manner prescribed by law. One of the basic requirements is that the court must be created by the same commanders as are empowered to appoint general courts-

martial (Winthrop, *supra,* p. 835; W. D. Basic Field Manual, FM 27-5, 23 December 1943; *Ex parte Quirin, supra;* Footnotes to Article of War 15). Mr. McCloy has no power under the law to appoint general courts-martial, nor could he act on the basis of delegated authority (*Manual for Courts-Martial,* 1949, par. 5a).

Another requirement is that the military tribunal be composed of officers of the Army (Winthrop, *supra, p.* 835; W. D. Basic Field Manual, FM 27-5, 23 December 1943, par. 402, 40d). Chief Justice Clark, in the *Ybarbo* case, *supra,* recognized that the tribunals functioning in Germany were not so composed and were of a different caliber. He said at pp. 210-211: "The only new and strange thing about the Military Tribunals in the Occupied Zone of Germany is their civilian character. In all other military occupations by the United States, the judges have been Army officers, not necessarily even lawyers. Here the standard of professional excellence and experience for our judges are higher than in many states of the United States. * * *"

What Justice Clark said may be true, but it does not justify a violation of the prescribed law. By the same token of reasoning, it can be argued that we should abolish our jury system and substitute therefor a panel of one, six or twelve lawyers of high professional standing and that an accused convicted before such tribunal would have no cause to complain. The fallacy of this argument need not be elaborated upon. A breach of a law or rule is not justified because someone thinks that a better result may be obtained by reason of the breach.

The practice and procedure normally followed in courts-martial cases must likewise be followed before a military commission, in a case such as this which does not involve an enemy national (*Manual for Courts-Martial,* 1949, Chap. 1, par. 2; Basic Field Manual, FM 27-5, 22 Dec. 1943[33];

[33] Practically all the requirements of W.D. *Basic Field Manual* 27-5, 22 Dec. 1943, were violated by the court system established in

In re Yamashita, supra; 29 Va. *L. R.* 317; 42 *Am. J. Int'l. Law* 832; see also, Articles of War 23, 24, 25, 26, 38, 47, 49, 53). Col. Winthrop, *supra,* states, at p. 841 that procedure before Military Commissions in the absence of statute or regulation to the contrary, is to be conducted in accordance with the procedure governing courts-martial.

The *Digest of Opinions of the Judge Advocate General,* 1912, at p. 1070, contains a general summary of what must be done to sustain jurisdiction. It will be noted that with-

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Germany. The military authorities in Germany, of course, almost always ruled in favor of their own acts, from which there was no appeal, nor was any other remedy, such as habeas corpus, available to the German people (*Eisentrager v. Johnson,* 339 U. S. 763).

Eventually it became obvious that the conflict between the War Department rules, set out in FM 27-5, and the actual practice in Germany could not continue indefinitely. Accordingly, after almost two and a half years of occupation, the Department of the Army recognized what was done in Germany as a *fait accompli.* In the year 1947 it issued a new Field Manual 27-5, dated October 14, 1947, which superseded and vacated all its earlier directives respecting military tribunals. The substituted directives accorded with the practice which was adopted in Germany—with one exception, nothing is therein contained authorizing Military Government Courts to take jurisdiction over "persons subject to military law" or over other American or Allied persons.

Regardless of what the language of the new Field Manual meant, it did not and could not change the law, even though adversely affected persons were without remedy of appeal or by habeas corpus proceedings in the duly constituted courts of the United States. The law respecting military tribunals, as recognized for almost one hundred years, was correctly stated in the 1943 Field Manual. The proof of that is the fact that the War Department issued it as a correct statement of the law. Nothing happened between 1943 and 1947, by way of legislation or judicial decision, except the ultra vires acts of the authorities in Germany, to warrant so complete a reversal of the War Department's earlier directive.

In Sec. 7, pp. 63-64, of the Field Manual dated 14 Oct. 1947, reference is made for the first time to "indigenous courts"—presumably this was intended to indicate that those courts had jurisdiction over indigenous persons only. "Indigenous" is defined in Webster's Collegiate Dictionary, 5th Ed., as "produced, growing, or living naturally in a country or climate; native." Certainly it cannot be reasonably contended that these "indigenous courts" apply to Petitioner. Nothing is said in the 1947 Field Manual which expressly or impliedly confers jurisdiction upon such occupation courts over persons "subject to military law."

out exception, every rule, there enumerated, has been violated by the Tribunal which functioned in Germany. The *Digest* reads:

"I C a (3) (d) [1]. Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment, the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition or procedure. *In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions.* They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts; the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed. *R.I. 453, 465, Dec., 1862; 2, 27, 83, 563, Feb. to June, 1863; 3, 428, Aug. 1873; 5, 95, Oct., 1863; 7, 556, Apr., 1864; 8, 111, Mar., 1864; 13, 392, Feb. 1865; 29, 39, June, 1869.* Their composition has also been the same, except that the *minimum* of members has been fixed by usage at *three.* R. 15, 149, Apr., 1865. They have generally also been supplied with a judge advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate, would be contrary to precedent. *R. 9, 591, Sept., 1864; 11, 497, Feb., 1865; 13, 286, Jan., 1865; 15, 204, May, 1865; C. 17328 Jan. 4, 1905.*

"In view of the analogy prevailing and sanctioned between these bodies and courts-martial, *held* that military commissions would properly be sworn like general courts-martial (*R. 11, 111, Nov. 1864*); that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences (*R. 23, 650, Aug., 1867*); and that the two years' limitation would properly be applied to prosecutions before them. *R. 9, 657, Sept., 1864.*

"I C 8 a (3) (d) [2]. *Held* that the proceedings of a military commission should be completed by the ac-

> tion at the end thereof of the officer who convened the commission or by his successor in command, the mode of procedure being the same as is followed by general courts-martial. *C. 5292, Nov. 8, 1898.*"

A military commission, by whatever name it may be called, like a court-martial is a tribunal of limited jurisdiction. It has no powers which are not specifically conferred upon it and its exercise of judicial power, like a court-martial, is conditioned on certain indispensable prerequisites. (*Anderson* v. *Crawford,* 265 F. 504.) Unless those prerequisites are complied with, its determinations are without binding effect. *Deming* v. *McClaughry,* 113 F. 639.) At page 650, the Court said:

> "A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it. * * * The absence of any of these indispensable conditions renders the judgment and sentence of a court-martial coram non judice, and absolutely void, because such a judgment and sentence is rendered without authority of law and without jurisdiction. Runkle v. U. S., 122 U. S. 543; 546, 7 Sup. Ct. 1141, 30 L. Ed. 1167; Mills v. Martin, 19 Johns. 7, 30; Wise v. Withers, 3 Cranch, 331, 2 L. Ed. 457; Ex parte Watkins, 3 Pet. 193, 207, 7 L. Ed. 650; Dynes v. Hoover, 20 How. 65, 80, 15 L. Ed. 838."

The rules respecting courts-martial set out in the *Deming* case above are also applicable to military commissions. (*In re Yamashita, supra; Ex parte Quirin, supra.*)

In addition to the fact that the Allied High Commission Court was not created or composed according to law and did not function in compliance with the rules relating to military tribunals, it sat in an area where neither military government nor martial law existed. With certain exceptions not here material, a military commission or other military tribunal, even if properly organized and com-

posed, is without power to act unless it functions in an area where martial law was properly imposed or where military government actually exists. (*Ex parte Milligan*, 71 U. S. 2; *Duncan* v. *Kahanamoku*, 327 U. S. 304; *Hamilton* v. *McClaughry*, 136 F. 445; *MacLeod* v. *United States*, 229 U. S. 416; Winthrop, *supra*, 799-800). If the period of occupation is over or the area not under actual military rule, the conqueror may not exercise any of the prerogatives of a victorious belligerent.

This Honorable Court held that, if these prerequisites do not exist, the conqueror may not even enforce its decrees to collect taxes or duties imposed. A fortiori it may not establish courts or perform other acts of sovereignty (*MacLeod* v. *United States*, 229 U. S. 416, and cases therein cited).

Military government in Germany terminated on September 21, 1949, before the date Petitioner was alleged to have committed the offense, before the date Petitioner was charged before the Military Government Court, and before the date of her trial before the Allied High Commission Court. (Dept. of State Pub. #3556, pp. 88-89; 106-107, 177-188; Dept. of State Bulletin, Vol. XXI, No. 523, p. 22; Report on Germany, issued by Office of High Commissioner, p. 1; R. 32, 41-64.)

Aside from the fact that military government terminated, Mr. McCloy was not vested with any power to, at any time, appoint a military tribunal for the trial of Americans who are a part of the Armed Forces of the United States. Mr. McCloy is a civilian in the foreign service, acting under direction of the Secretary of State. (The Foreign Service Act of 1946, 60 Stat. 999; 22 U. S. Code 801-866; Dept. of State Pub. No. 3556, p. 182.) Neither by statute of the United States nor by the laws of war has a civilian employee of the State Department ever been vested with the power to appoint courts to try Americans. The commanding general or the military governor of an occupied area alone may, under certain circumstances, appoint such courts. Whether Mr. McCloy had such power during the

short time he acted as the military governor is not material here. Mr. McCloy was not the military governor nor did he exercise any military command functions in October 1949 when this case arose. Nor was he vested with any of the sovereign power of Germany. The sovereignty of Germany is exercised by the Federal German Republic. (See documents referred to above, R. 32, 41-64.) Furthermore, the "Office of the United States High Commissioner for Germany" was not vested with any of the sovereign powers of the United States sufficient to make it a complainant in a criminal charge against an American citizen, such as was done here (R. 36).[34]

In the attempt to justify the existence of the so-called United States Court of the Allied High Commission, the officials in Germany originally took the position that such courts were international and not bound by any of the laws of the United States.[35]

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[34] The argument was made by the District Court that unless the tribunal in question and its proceedings be considered legal, Americans in Germany would be immune from punishment (R. 87). Such is not the fact. The Articles of War are ample to cope with any situation involving persons subject to military law, and those who are not so subject may be tried before the German courts which were open and functioning. If such practice be not considered feasible, then such persons, as are not subject to military law, may be tried before any *duly* constituted military commission—which the tribunal in question was not.

[35] On February 4, 1949, the following appeared in the Army newspaper called "Stars and Stripes":

> "Frankfort, Feb. 4 (S&S)—U. S. courts of the Allied High Commission for Germany are international in scope and jurisdiction, and their decisions are not subject to review in the U. S., a top HICOG legal official said.
>
> "The courts have been set up under provisions of the Allied High Commission charter, an international instrument signed by the U. S., Britain and France. Federal courts in the U. S., in a recent ruling on the case of Friederich Flick, former German industrialist convicted of war crimes at the 'minor' Nurnberg

The Government has apparently adopted a different view since the institution of the habeas corpus proceeding by Petitioner. It now asserts that the tribunal which tried Petitioner was a "military commission" within the purview of Article of War 15. The Government of necessity had to discard its earlier theory concerning the international character of the court for the following reasons. First, because it conflicts with Mr. McCloy's assertion that the Allied High Commission Court was merely a change of name from the former military government courts; second, because, if the jurisdiction of the Allied High Commission Court stemmed from a source different from that of its predecessor the Military Government Court, then we would have the anomalous situation of a person being charged in one court and tried in another; third, because neither Mr. McCloy nor anyone else was authorized to turn Petitioner over to a foreign tribunal (one operating under alleged international authority) for trial, without conforming to the statutes in such cases made and provided (Title 18, U. S. Code, Sec. 3185); fourth, because conviction by a foreign or international tribunal and for a violation of foreign law does not justify or authorize imprisonment in a United States penitentiary (18 U. S. Code, Secs. 4082-4); and fifth, because the entire theory that this tribunal is in the same category as the tribunals involved in *Flick* v. *Johnson*, 174 F. 2d 983, cert. den. 338 U. S. 879, and *Hirota* v. *McArthur*, 338 U. S. 197, is devoid of merit.

Since the Court of Appeals decision in this case and on May 24, 1951, the Office of the United States High Com-

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trials, have decided they have no right to review appeals from international courts.

"Under this interpretation, cases decided in the U. S. Zone district courts can be appealed to the U. S. Zone Court of Appeals in Nurnberg, and can thereafter be brought to the attention of the Allied High Commission, but cannot be appealed beyond the commission, the HICOG legal official pointed out."

missioner for Germany enacted "Law No. 20," which establishes a "United States Court of the Allied High Commission" with judges to be known as "United States Judges for Germany." (Art. 1, secs. 1 and 2, Official Gazette of Allied High Commission, p. 919.)

Whether, by reason of the above, the State Department officials and the military establishment may revert to their former position that this new body is an "international tribunal" whose decisions this Honorable Court may not review (*Hirota* v. *MacArthur, supra*), is not known. Regardless of what is asserted, however, the fact remains that the Court which tried Petitioner was not a military commission or other military tribunal as understood in our law, more particularly Article of War 15, and its decree ordering Petitioner imprisonment for a term of years is a nullity.[36]

Conclusion

Petitioner respectfully prays that the relief sought in the foregoing Petition be granted, in order that this Honorable Court can determine whether her rights, and the rights of others similarly situated, may be made subservient to military dictates and if so, to what extent.

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[36] Other arguments and principles of law concerning the legality of Petitioner's detention, made in the Courts below, are being omitted on this Petition for a writ of certiorari. If this Honorable Court grants the relief herein prayed for, then those arguments will be made upon hearing, unless this Court directs otherwise. The other arguments involve in the main, the propriety of the length of the sentence and the place of confinement. Petitioner contends that under the German law, pursuant to which she was tried, the maximum sentence was five years; that confinement in a penitentiary was not authorized, and that her jailor is without power to detain her upon conviction of any offense, except one involving a crime declared to be such by Congress, and in a case wherein "The People of the United States," and not the "Office of the Allied High Commissioner" was the complainant.

In *Duncan* v. *Kahanamoku, supra,* the late Mr. Justice Murphy, in a concurring opinion, said:

> "There is a very necessary part in our national life for the military; it has defended this country well in its darkest hours of trial. But militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties" (p. 335).
>
> "Constitutional rights are rooted deeper than the wishes and desires of the military" (p. 332).

Respectfully submitted,

JOSEPH S. ROBINSON
DAYTON M. HARRINGTON
JAMES D. GRAHAM, JR.
JOHN C. MORRISON,

Attorneys for Petitioner.

Office-Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

411

No. ~~82 Misc.~~

YVETTE J. MADSEN,

Petitioner,

v.

NINA KINSELLA, Warden of the U. S. Reformatory for Women,

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

JOSEPH S. ROBINSON,
745 Fifth Avenue,
New York 22, New York,

HARRINGTON & GRAHAM,
454 Washington Building,
Washington 5, D. C.,

JOHN C. MORRISON,
1601 Kanawha Valley Building,
Charleston 22, West Virginia,

Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER

Counsel wish to call two recent matters to the attention of this Honorable Court which were not referred to in the Petition, and which warrant consideration in connection therewith.

1. Under the Uniform Code of Military Justice, 50 U.S.C. §§ 551-736, the categories of persons accompanying the Armed Forces and subject to military law have been considerably enlarged. This Honorable Court's decision on this Petition will therefore vitally affect the lives, liberty, and property of many more Americans in various parts of the world, than would have been affected under the Articles of War.

2. As predicted in the Petition and Brief in support thereof, the decisions of the lower Courts herein have already been cited by the tribunals in Germany as authority for denying our Constitutional and statutory safeguards to Americans who appear before such tribunals. As nearly as counsel have been able to ascertain, such is the practice now uniformly followed in these tribunals even though the American flag hangs in the court rooms and even though the tribunals regard themselves as wholly American institutions.

To cite two examples which have come to counsel's attention:

In the case against R. Harris, an American citizen, the accused was told on September 12, 1951, by Justice of Area 3, Robert Guthrie, that Harris had no more rights than a German in that tribunal. Harris' American lawyer reported that elementary rules of evidence were wholly disregarded and that the Harris trial was practically a farce. Although Harris was acquitted, he had been held in a German jail prior to his trial.

In the case against A. E. Barshay, an American citizen, the accused was denied the American counsel of his choice and advised on September 11, 1951, by Presiding Justice of Area 3, DeWitt White, that although Barshay could have appointed counsel, he had no right to counsel of his own choice. The same Justice also told Barshay that he had no rights under the Constitution or Laws of the United States in that tribunal.

Before the decisions of the lower courts herein, at least lip service had been given by the tribunals in Germany to our Constitutional and statutory rights of American defendants, but these rights are now openly flounted and disregarded. The tribunals in Germany have interpreted the decisions of the lower courts herein as giving them carte blanche approval and, we repeat, that unless this Honorable Court reviews the entire matter, we fear the consequences of this unwholesome situation.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Petition for a Writ of Certiorari herein filed, said petition should be granted.

Respectfully submitted,

JOSEPH S. ROBINSON,
745 Fifth Avenue,
New York 22, New York,

HARRINGTON & GRAHAM,
454 Washington Building,
Washington 5, D. C.,

JOHN C. MORRISON,
1601 Kanawha Valley Building,
Charleston 22, West Virginia,

Counsel for Petitioner.

Office - Supreme Court, U. S.
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OCTOBER TERM, 1951

No. 411

YVETTE J. MADSEN,

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vs.

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Respondent.

PETITIONER'S REPLY BRIEF

JOSEPH S. ROBINSON,
745 Fifth Avenue,
New York 22, New York,

DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
454 Washington Building,
Washington 5, D. C.,

JOHN C. MORRISON,
1601 Kanawha Valley Building,
Charleston 22, West Virginia,

Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1951

No. 411

YVETTE J. MADSEN,

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Respondent.

PETITIONER'S REPLY BRIEF

On November 5, 1951 this Honorable Court granted certiorari and also granted Petitioner's application to proceed *in forma pauperis.*

The brief in support of the petition for certiorari, the petition for the writ of certiorari, and the supplemental brief fairly and completely state the facts and Petitioner's version of the applicable law. Because petitioner is proceeding *in forma pauperis,* it is respectfully requested that these documents be considered as her main brief.

The facts, with but few exceptions,[1] are undisputed and much of the legal argument of Petitioner is not controverted

[1] Respondent argues that military government, as such, did not terminate on September 21, 1949 (Resp. Brief Cert., pp. 27-28), the day on which the Occupation Statute went into effect. The Statement of Facts which was agreed upon between the Petitioner and Respondent specifically states that it did so terminate (R. 32). The official announcements of the State Department say that it terminated (R. 53-56). Honorable John J. McCloy, the United States High Commissioner in Germany, testified before Congress that it terminated (see Petition for Certiorari, pp. 3-4). There has been no "misapprehension" by Petitioner of the language employed in these documents or the actualities of the case, as Respondent con-

by Respondent. Respondent has, however, raised several legal questions and this reply is submitted in order to point out the fallacy and lack of merit of those arguments.

I. That Petitioner was "a person subject to military law" within the purview of Article of War 2 is no longer disputed. Nothing is said in Respondent's Brief on Certiorari to the effect that she was not such a person. The "grave doubts" on the subject expressed by the Court below (R. 120) are apparently not concurred in. The District Court ruled that Petitioner's classification as a person subject to military law was immaterial to the issues (R. 92). The Tribunal in Germany, in its *Ybarbo* decision, held that a dependent wife residing with her soldier husband in a war or occupied zone was a person subject to the Articles of War. Winthrop and the other leading authorities on military law cited in Point I of Petitioner's brief, all agree that Petitioner is so subject. The pleadings in this case likewise admit it (R. 4 and 17). The language of Article of War 2, particularly in the light of the 1916 amendment and the historical development of the Article, permits of no other interpretation.

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tends (Resp. Brief Cert., p. 27). Respondent is faced with a legal obstacle which she apparently is unable to meet. She therefore insists that military government was in force at the time of Petitioner's trial when, in fact, it did not. Winthrop, in his work on *Military Law and Precedents*, 2nd Ed., 1920 Reprint, at page 836 states:

> "A military commission (except where otherwise authorized by statute), can legally assume jurisdiction only of offences committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory. (2) The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission (unless specially empowered by statute), will have no jurisdiction of offences committed there." (See also Winthrop, supra, pp. 837-839 as to persons and offenses triable before military commissions.)

The question of the exclusiveness of court-martial jurisdiction over the persons enumerated in Article of War 2 and over the persons enumerated in the much larger group in the same Article in the new Uniform Code of Military Justice is one of the major issues for this Court's determination.

II. The jurisdiction of court-martial is exclusive. Respondent contends that by reason of Article of War 15 (now Article 21 of Uniform Code of Military Justice), military commissions have concurrent jurisdiction with courts-martial over all offenders and offenses, even over those which the Articles of War and the new Code specifically declare punishable by courts-martial. The fallacy of this contention is fully argued in Points II and III of Petitioner's Brief in support of certiorari. There are several statements, however, in Respondent's Brief in Opposition to Certiorari (Referred to herein as Resp. Brief Cert.) which tend to confuse the issue and which should not be permitted to remain unchallenged.

The early Articles of War contained no specific provision authorizing trial by courts-martial of any person (soldiers, officers, or others) for what is commonly known as the major offenses, i.e. murder, rape, burglary, etc. Such crimes were punishable by courts-martial only if they constituted conduct prejudicial to good order and military discipline or if such conduct affected the military service (Winthrop, *supra*, p. 667).[2] To punish offenses *not* specifically enumerated in the early Articles of War, the military

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[2] Winthrop states: "Prior to its enactment (Act of Congress, March 3, 1863, c. 75) courts martial were not invested, either in peace or war, with a jurisdiction of the violent crimes cognizable by the civil courts, except where the same directly prejudiced 'good order and military discipline.' In 1863, however—during the late Civil War—the provision, incorporated in this Article, initiated in our military law the marked innovation of investing general courts martial with jurisdiction, in time of war, etc., of the graver civil crimes when committed by military persons, without regard to whether such crimes directly prejudice military discipline or affect the military service."

commission was employed (Dig. Op. JAG, 1912, pp. 1064-5, 1069-70; Winthrop, *supra*, p. 841). This is made clear by the unequivocal language of the earliest known document relating to military commissions, namely, General Order No. 20, dated February 19, 1847. It states: "* * * that no military commission shall try any case clearly cognizable by any court-martial * * *." Probably because of this historical background, offenses cognizable by courts-martial were commonly referred to as "military offenses." As Congress enlarged the categories of offenses punishable by courts-martial, they too became known as "military offenses." In Dig. Op. JAG, 1912 at p. 1065, "military offenses" are defined as "offenses which the Articles of War make cognizable by court-martial."

By the Act of 1863, the offense of murder became such a "military offense", since that Act, for the first time, made murder punishable by courts-martial regardless of whether or not the killing was considered as conduct prejudicial to good order and military discipline. In 1874, Congress enacted Article of War 58,[3] the predecessor of Articles of War 92 and 93 (now Articles 118-131 of the Uniform Code of Military Justice). The language of Article of War 58 was identical with the language employed in the Act of 1863 with only one material exception, i.e. the offenses enumerated in Article 58 were made punishable by courts-martial alone and the language in the Act of 1863 which authorized punishment by military commission was omitted (Winthrop, *supra*, p. 667).

Respondent admits (Resp. Brief Cert., p. 19) that Congress, by its enactment of Article of War 58 in the year

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[3] "Art. 58. In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or district in which such offence may have been committed."

1874, intended to invest courts-martial with exclusive jurisdiction as against military commissions, to try persons for murder, larceny, etc., but argues that such exclusive jurisdiction was only for persons "in the military service"; that persons in the category of Petitioner, a civilian, were not "in military service" and therefore not punishable by courts-martial for a violation of Article of War 58. In this respect Respondent errs (Article of War 60 of the 1806 articles, Article of War 63 of the 1874 articles, Winthrop, *supra,* pp. 98-99, Dig. Op. JAG 1912, pp. 151-152).

Under the 1874 Articles of War, the words "persons in the military service" used in Article 58 merely denominated a group of persons who were subject to the then Articles of War just as in the more recent Articles, the words "persons subject to military law" denominate a particular group of persons subject to those Articles of War (*In Re Yamashita,* 327 U. S. 1, 19). Mr. Chief Justice Stone, in delivering the opinion of the Court in the *Yamashita* case, made that quite clear. He said, at p. 19, that persons were so enumerated or denominated for the purpose of classification, and that the denomination included members of the Armed Forces and "the personnel accompanying the Army."

If, as Respondent contends, the words "persons in the military service" meant only the fighting personnel and not persons employed by, serving with, or accompanying the Army (*attaches*), how then does Respondent explain the basis for punishing such *attaches* by courts-martial for the various offenses enumerated in the Articles of War? Winthrop points out (pp. 98-100) that many such *attaches* were tried by courts-martial for the many offenses enumerated in the various Articles of War. Col. Winthrop said, at p. 98:

> "Protected as they are by the military arm, they owe to it the correlative obligation of obedience; and due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and com-

munication with the enemy, requires that these persons [retainers, attaches, those 'accompanying' etc.] shall be governed much as are those with whom they are commorant."

The group denominated as "persons in the military service" under the 1874 Articles of War and the group denominated as "persons subject to military law" under the 1920 Articles of War[4] included all *attaches*. Petitioner was a person within the denominated group and triable exclusively by courts-martial as against military commissions since 1874, when Congress denied such jurisdiction to military commissions.[5]

Had Congress intended to continue the military commission as a court of competent jurisdiction to try the offense of murder, it would have so declared just as it did in other Articles relative to other offenses (see Articles of War 80, 81, and 82 of the 1920 Code). Both under Article 58 of the 1874 Code and Articles 92 and 93 of the 1920 Code (now Articles 118-131 of the Uniform Code of Military Justice), persons in the category of Petitioner were triable by courts-martial for a violation of those Articles.[6] If the offense

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[4] This group is now referred to as "persons [are] subject to this Code" (Uniform Code of Military Justice, Art. 2).

[5] Congress intended and stated that only certain Articles of the 1874 Articles of War should apply exclusively to military persons, i.e., soldiers and officers. For example, Article of War 20 of the Articles of 1874 states that "any officer or soldier who misbehaves * * * shall be punished as a court martial may direct." Article 21 of the Articles of 1874 states "any officers or soldiers who * * * strikes * * * or offers any violence * * * or disobeys any lawful command * * * shall be punished as a court martial may direct." Articles 22, 23, 25, 26, and many others of the 1874 Enactment specifically refer to officers and soldiers; other Articles refer to soldiers alone, while still others refer to officers alone. Article 58 of the 1874 Articles of War contains no such limitation. The failure on the part of Congress to so limit Article 58 indicates an intent that said Article be applicable to all persons subject to the Articles of War, and not to soldiers and officers alone. The same is true of the 1920 Articles. Compare Articles of War 92 and 93 with Article 65.

[6] The limited provision of Article of War 58 (1874) making that Article applicable only "in time of war, insurrection or rebellion,"

were committed within the United States, civil courts and courts-martial had concurrent jurisdiction (*Caldwell* v. *Parker*, 252 U. S. 376).

Aside from the question of the exclusiveness of courts-martial jurisdiction to try Petitioner, the substantive law applicable should have been that of the Occupying Force and not the law of the area conquered. (*Coleman* v. *Tennessee*, 97 U. S. 509; *Hamilton* v. *McClaughry*, 136 F. 445, 448; and other authorities cited in Point II of Petitioner's Brief in Support of Certiorari.) Here, in addition to employing the wrong Tribunal, the substantive law of the conquered area was also wrongfully employed.

III. The Tribunal which tried Petitioner was not a duly constituted military commission, nor did it function as a military commission. Respondent does not contend that the Tribunal in question was created or constituted in accordance with the rules respecting the establishment of military commissions. Nor does Respondent contend that there was conformity with the law, as stated by this Honorable Court in *In Re Yamashita*, 327 U. S. 1, relative to the creation and procedure of military commissions.

Respondent claims that a judicial system was established which embodied basic procedural rights of American

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which General Crowder testified (Sen. Rep. 229, 63rd Cong., 2d Sess.) prevented the trial of two soldiers for murder committed by them after the Spanish American War, was stricken from the 1920 Articles. A provision was inserted in the Preamble which states that the Articles of War "shall at all times and in all places govern the Armies of the United States." Under the 1874 Articles, neither soldiers nor civilians could be tried, except in time of war, for a violation of the 58th Article. That defect in the Articles of War was cured by the language of the Preamble and Articles of War 92 and 93 of the 1920 Code, and not by Articles of War 12 and 15, as Respondent contends. Even assuming that there had been no changes in 1920 and that the 1874 Articles continued in effect to the present day, persons in the category of Petitioner, would be amenable to the courts martial jurisdiction in 1949 (the year Petitioner was tried) because a state of war did exist at that time, thereby satisfying the requirement of Article of War 58 (Winthrop, *supra*, pp. 666-671).

civilian law; that an appeals court was established; that this system is "more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts"; and that "only the clearest of commands in the Articles of War could preclude the President and his military commanders from taking such enlightened action" (Resp. Brief Cert., pp. 26-27). However Respondent may choose to characterize the action taken, she does not answer the basic contention of Petitioner that this is a nation of laws and that we are here confronted with the question whether the rule of law or the rule of military dictatorship (however benevolent it may be) is to be followed.

The law with respect to the establishment of military commissions and the procedure before such Tribunals, even though in part unwritten, is, like the common law, firmly established and any deviation therefrom is unauthorized (Winthrop, *supra*, pp. 831-846). Congress intended that the military commission shall be governed by the rule of law (see Articles of War 38, 47(c), 15, footnotes to 15, 23, 24, 25, 26, 115, and corresponding Articles in the Uniform Code of Military Justice). This Honorable Court, like Congress, has indicated that military commissions shall be governed by the rule of law (*In Re Yamashita, supra*).

In Article of War 47(c), Congress decreed that a certain procedure be followed before the finding of a military commission may be made effective, and that review be by a designated military officer.[7] Respondent, apparently, seeks to justify the failure to follow that procedure concerning Review with the statement that: "An appeals court of ci-

[7] "47(c) *Action on record of trial.*—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it."

INSERT, beginning page 9, third line of Petitioner's Reply Brief.

In addition, Article of War 47(c), implies that persons "subject to military law" may *not* be convicted by a military commission for any crime other than a violation of the Articles of War. Hence the language that no sentence of a military commission may be carried out unless guilt is established beyond a reasonable doubt "* * * of an offense made punishable by these articles, * * *" This clause does not apply to enemy aliens, as they do not fall within the provisions of the Articles of War (*In re Yamashita*, supra), but it does apply to Petitioner, who is so subject.

Respondent states that "* * * petitioner does not allege violation of any Article of War which is specifically applicable to military tribunals other than courts martial." (Resp. Brief p. 75) Petitioner refers to Articles of War 47(c), 38, and the other articles hereinabove mentioned as well as to articles 18 and 40 hereinafter mentioned. Reference to this matter is now made only because such issue was injected by Respondent (see page 18 ante).

In any democratic system for the trial of capital offenses, an accused is permitted unlimited challenges for cause and at least one or more pre-emptory challenges. Congress provided for such challenges in courts-martial proceeding (Article of War 18). Had Petitioner been tried before a courts-martial or had the Articles of War been made applicable to her trial—as they should have been, (assuming arguendo that she was properly tried before a military commission), she would have been permitted such challenges. Here Petitioner was required to stand trial before an appointed group of civilians (R. 66-67; Pet. Brief Cert. p. 5) with no challenges of any kind being permitted. Furthermore, the appointed group of civilians were authorized to act upon a majority vote, whereas Article of War 43 requires at least a three-quarter vote. Certainly, allowing a lesser vote injuriously affects the substantial rights of an accused (Dig. Op. JAG. 1912-40, p. 248). The right

of challenge, also, is an absolute right, denial of which affects "the substantial rights of the accused" and voids the proceeding (Dig. Op. JAG. 1912-40, p. 185, sub. div. 1; Manual for Courts Martial, 1949, p. 56).

The judges in these tribunals take an oath—but not an oath to uphold the Constitution and Laws of the United States (14 Fed. Register 127, Jan. 11, 1949), although they claim to act upon the authority of the United States with power to judge and punish citizens of the United States even to the extent of inflicting death. Why is the American flag in court rooms, wherein those who there act, claim to have the power, although they say it was not exercised, to trample under foot all the immutable rights and due process requirements for which the American flag stands?

Respondent argues at great length by a process of false legalism, that the words "law of war" as contained in Article of War 15 include any and all offenses and any and all offenders which under the old unwritten rules of warfare were punishable before tribunals appointed by the conquering or occupying force—military commissions since 1847 (Resp. Brief p. 26-52). Respondent states (Resp. Brief p. 40) that Petitioner is wrong in her assertion that those words refer only to offenses which offend against the law of war. Even the *Ybarbo* decision agreed with Petitioner's view and the writer of that opinion had to rely on some other admittedly untenable ground to sustain jurisdiction. This Honorable Court's interpretation of the words "law of war" in both the *Quirin* and *Yamashita* cases likewise accords with Petitioner's interpretation and not that of Respondent. It is to be noted that the Congressional Committee studying the proposed enactment of the Uniform Code of Military Justice was advised by the military officials that the words "law of war" mean exactly what Petitioner contends. Mr. Larkin answered "I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war * * *. You have an example in

that Sabateur case [the Quirin case]. That was a military commission." (Resp. Brief p. 61)

Murder committed by one member of an armed force against another member of the same armed force is not an offense against the Law of War. Article of War 15, therefore, has no applicability to the facts in this case, but even if it be assumed that it does have, the tribunal established in Germany which exercised alleged "concurrent jurisdiction" was of a type heretofore unheard of and did not conform to the rules of law applicable to such military commissions.

vilian judges was also established" (Resp Brief Cert., p. 26). But that is not what Congress directed.

Actually none of the rules respecting creation, composition, procedure, or review were followed and Respondent does not contend otherwise. As an excuse for not following the rule of law, Respondent says that the authorities cited by Petitioner are not law but are "at most suggestions and recommendations" (Resp. Brief Cert., p. 24) which do not have to be followed.

It is a novel theory, to say the least, to argue that acts of Congress and the law as laid down by this Honorable Court are merely "recommendations and suggestions" which may or may not be followed depending on the will of a commanding general or, as in this case, a subordinate State Department official. Absolute power and unlimited discretion, in effect, says Respondent, were vested in the military authorities in the American Zone of Occupied Germany and later in the State Department officials who were in control of the same area.[8] This proposition is wholly foreign to all basic concepts of constitutional government and unless we are willing to accept military dictatorship even to the limited extent espoused by Respond-

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[8] Mr. Justice Douglas, stating a general principle, with which no one would disagree, said in a dissenting Opinion (*United States* v. *Wunderlich*, decided November 26, 1951):

> "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered. At times it has been his property that has been invaded; at times, his privacy; at times, his liberty of movement; at times, his freedom of thought; at times, his life. Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions."

On the same day, in *State of New York* v. *United States*, Mr. Justice Douglas, in another dissenting Opinion, stating another undisputed general principle, said:

> "Absolute discretion, like corruption, marks the beginning of the end of liberty. This case is perhaps insignificant in the annals. But the standard set for men of good will is even more useful to the venal."

ent, it should be rejected now, before this cancerous proposition has time to root.

IV. Persons subject to military law are not amenable to the laws of the area conquered or occupied by the Forces of the United States. Respondent reiterates what she argued before the District Court, namely that "even soldiers could be tried by military commissions for civilian crimes" (Footnote 12, Resp. Brief Cert., p. 20). Respondent argues in effect that the commanding general of an area or, in this instance a State Department official, may supersede the will of Congress as expressed in the Articles of War and may order the trial of American soldiers before tribunals of the character established in Germany, instead of by courts-martial, and for violations of local law instead of violations of the Articles of War.

This Honorable Court, in *Coleman* v. *Tennessee, supra,* and *Dow* v. *Johnson,* 100 U. S. 158, ruled that the personnel of our military forces are not amenable to the laws of the conquered area. Perhaps Respondent intends to imply that the rulings made in the *Coleman* and *Dow* cases were merely "suggestions" just as she claims that the rule of law laid down by this Honorable Court in *In Re Yamashita* was only a "suggestion" (Resp. Brief Cert., p. 24). The Appeals Tribunal in Germany, in its *Ybarbo* decision, characterized these rulings as "dictum".

Both the *Coleman* and *Dow* cases are glossed over by Respondent with the comment that they "hold only that the soldiers and officers of a conquering force were not subject to trial by the enemy" (Footnote 13, Resp. Brief Cert., p. 22). In terms too clear for misinterpretation, the rulings in those cases were that the local laws of a conquered area remain in force only for the inhabitants of the country occupied, and that the personnel of the occupation forces are not subject to the substantive law of the area so occupied.

Respondent cites, in addition to *Nealy* v. *Henkel,* 180 U. S. 109, and *Santiago* v. *Nogueras,* 214 U. S. 260 (neither

of which cases, as pointed out in Petitioner's Brief on Cert., pp. 50-51, has any applicability), the case of *Ex Parte Ortiz*, 100 F. 955. She cites it for the proposition that military commissions may be employed to try Americans, even those who are subject to the Articles of War, for offenses committed by them in an occupied area. The *Ortiz* case, although somewhat inconsistent in its reasoning with the *Santiago* case *supra*, nevertheless does *not* support Respondent's contention. That case involved the criminal trial of a Puerto Rican citizen before a military commission duly and properly appointed in Puerto Rico during the period of belligerent occupancy. In a *habeas corpus* proceeding, the United States District Judge said (p. 956): "* * * no objection in respect to the formal regularity of the proceedings is made or suggested." He then said (p. 957) that our Government and its agents do not have unlimited power to rule even a "subject people" because such rule is "the worst form of tyranny".

V. Unlimited power is not vested in the President, the military authorities, or in the State Department officials, to create tribunals for the trial of persons within the purview of Article of War 2 (now Article 2 of the Uniform Code of Military Justice). Respondent argues in substance that absolute and unlimited power is in the military authorities and State Department officials to establish tribunals in an occupied zone unhampered by the Constitution, the Acts of Congress, or the decisions of this Honorable Court. She argues further that any American citizen, whether that citizen be a soldier or a civilian, may be tried before tribunals so established, by procedure decreed by such authorities and for violation of either foreign law or for violation of any of their directives.

Nowhere in any branch of our National Government does there lurk a power so vast and unharnessed as is here claimed to exist. But, says the Respondent in substance, the system employed in Occupied Germany embodied basic procedural rights of American civilian law. We staffed

our courts, she says, with civilian judges experienced in civilian law and this "is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts" (Resp. Brief Cert., p. 26). It is true, she continues, that many authorities, including the United States Supreme Court decisions, have held that we might have acted in a different manner, but these were only "suggestions and recommendations" which we chose not to follow (Resp. Brief Cert., p. 24). Petitioner's contention, says Respondent, that "she was entitled to be tried by a court composed of Army officers appointed by a military commander empowered to appoint general courts martial, and in accordance with the procedures specified in the Articles of War * * *, if sustained would be startling" (Resp. Brief Cert., p. 25). There are many thousands of American civilians in the Occupied Zone, Respondent says, and "As a substitute for the withdrawn jurisdiction of German criminal courts, a large number of these persons could have been subjected to the criminal jurisdiction of army court martials * * *" instead we established the system here under attack (Resp. Brief Cert., p. 26).

Startling, indeed, is this argument. Never before, counsel may venture to say, has it been claimed that Americans anywhere are outside the pale of the Constitution and Laws of the United States in a case involving trial by American authority. Respondent says that "enlightened action" was followed by the military and State Department officials in the creation of the court system in question (Resp. Brief Cert., p. 27). But what of the wicked ruler who may choose to follow less "enlightened action"? Apparently he too may act unhampered because, as Respondent argues, all the authorities respecting the establishment and procedure of military commissions "constitute at most suggestions and recommendations" (Resp. Brief Cert., p. 24) which do not have to be followed.

The mantle of "enlightened action" ill befits a judicial system which holds that neither the Constitution nor any

Statute of the United States applies to any trial before it whether the accused be an American civilian or an American soldier. Although Respondent says that basic procedural rights of American law were applied (Resp. Brief Cert., p. 26), General Joseph T. McNarney, Commanding General of the United States Forces in Europe, and his chief legal advisor, the Theatre Judge Advocate of the European Command, both of whom were on the scene and in a position to know, thought otherwise (see Footnote 3, p. 6, of Petition for Cert. and Footnote 28, p. 42, of Petitioner's Brief in Support of Cert.).[9]

[9] To deny protection against self-incrimination, to draw unfavorable inferences from silence, to admit hearsay evidence in a criminal proceeding, to deny effective representation by counsel and to try Americans under a judicial system which "lack[s] many of our recognized Constitutional guarantees and procedural safeguards," all of which General McNarney and his Theatre Judge Advocate pointed out in their communications to the War Department (JAGJ 1946/7691), is not the American way. To imprison Americans in enemy alien jails (see A. W. 16), to deny them the free choice of counsel, and to disregard elementary rules of evidence, all of which is pointed out in Petitioner's Supplemental Brief filed in Support of Certiorari, does not appear to be "enlightened action" nor action which accords with "our fundamental political ideals," despite Respondent's contention to the contrary.

Only recently the Appeals Tribunal in Germany, in Opinion No. 677 decided 15 August 1951, ruled that evidence illegally acquired is admissible even though a Military Directive (EUCOM SOP 96) and the Manual for Courts Martial, 1949, Par. 138 (Par. 152 of the 1951 Manual) direct the contrary. Recently, also, Counsel was advised that in the *Barshay* case (Petitioner's Supp: Brief on Cert., p. 2), the accused, being dissatisfied with a court-appointed lawyer, was held in contempt of court when he requested permission to act as his own counsel.

The judicial system in Germany likewise denies trial by jury or by a Board of Officers which is the substitute for a jury in the military system. One or three lawyers, depending upon the nature of the case, who interpret substantive law, which most of them cannot read as originally promulgated (since it is written in German), sit in judgment of an accused. They claim to have the power to inflict the death penalty or life imprisonment on American citizens even though none of the Constitutional or Statutory guarantees, they say, need be applied (see Petition in Support of Certiorari, p. 12). Counsel for the Petitioner do not agree that the system established

VI. The Constitution and laws of the United States apply to all trials of Americans conducted by American authority. In the lower Courts, Respondent contended without equivocation that Petitioner had *no* rights under the Constitution or any statute of the United States which would apply to her trial before the Tribunal before which she was tried (see p. 12 of Petition for Certiorari). While this contention is not repeated in so many words before this Court, Respondent, nevertheless, urges nothing to the contrary. Either this Petitioner and the thousands of other persons who are denominated as being within the purview of Article of War 2, are within the protective mantle of the Constitution and Laws of this country or they are subject to the worst form of military (in this case, State Department) dictatorship. The claim that such persons are subject to trial pursuant to "enlightened action" taken by the President and his military commanders (Resp. Brief Cert., p. 27) does not mitigate from the horror of dictatorship. Either the vast and seemingly unrestrained power wielded in this case exists, or it does not. The claimed good intentions with which it was exercised is of little consequence. The existence of the asserted power is one of the major questions which is presented upon this appeal.

The Fifth Amendment guarantee of due process of law applies to this Petitioner as well as all other Americans who are accused of crime by the Federal Government or any of its agents. Due process under our system of law does not allow for dictatorship regardless of how benevolent it is claimed to be. Due process does not recognize the judicial authority of any assembled body of men who act under American authority, be they called a military tribunal or an allied high commission court, to judge and imprison an American citizen, unless that body is assembled and com-

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in Germany accords with "our fundamental political ideals" or that it constitutes "enlightened action". It is a dictatorship which should be branded as unworthy of American tradition just as this Honorable Court branded the earlier case of military dictatorship which came before it in 1946 (*Duncan* v. *Kahanamoku*, 327 U. S. 304).

posed in accordance with law and unless it functions in accordance with law.

Respondent points to no part of the Constitution or Statutory laws of the United States which authorizes the establishment of the judicial system in question. She asserts merely that it flows from the war powers of the President and the unwritten common law of war, and that such war powers and law of war vests in the commanding general of a conquered area (or the State Department officials in that area), unlimited power to try and punish American citizens for violations of foreign law. Petitioner contends that no such dictatorial power exists in any branch of the United States Government and that to hold otherwise is to disregard the due process clause of the Constitution.

A similar question was before this Honorable Court in *Ex parte Milligan*, 71 U. S. 2. There the Court said, at p. 118, "Had this tribunal the *legal* power and authority to try and punish this man? No graver question was ever considered by this court, nor one which more clearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law."

VII. Respondent's Brief, which, except for its length, is substantially the same as the one submitted in opposition to certiorari, was received on January 3rd after Petitioner's Reply Brief had gone to press.

On page 4 the statement is made that by Military Government Proclamation No. 2, dated September 19, 1945, the German law of the area was continued in force. The fact is that this Proclamation was directed to the German people (R. 103) and intended for the German people only (JAGJ 1946/7691, 10 December 1946, par. 9; cf., *U. S. Mil. Govt.* v. *Collister*, Opinion No. 60, Reports, Mil. Govt. Courts for Germany). Counsel have been unable to find any decree or order making German law applicable to Americans.

Respondent states (p. 24) that "Mexican and Civil War military commissions tried over 2,000 cases, including the

cases of 100 women. Winthrop op. cit. pp. 834, 838." Col. Winthrop states that military commissions must have tried upwards of two thousand cases (nothing is said about the hundred women), but he points out that this was done pursuant to the Act of 1863 and General Order No. 20 of 1847 which authorized such trials during that period. Winthrop points out further, that the proceedings were legalized by the Act of March 2, 1867, c. 155 (p. 834) and that by the Act of 1874 the military commission was dropped as a court of competent jurisdiction to try the major offenses enumerated in Article of War 58 of the 1874 Code (Winthrop, *supra*, p. 667).

Respondent quotes at length (pp. 31-40 inclusive) from the testimony of General Crowder, given in 1916 before Congressional Committees in support of various amendments to the Articles of War. Material to the issues in this case is the following:

> "It [Article of War 15] just saves to these war courts *the jurisdiction they now have*, and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. *Both classes of courts have the same procedure.*" (Italics supplied.) (Sen. Bill S-3191, 64th Cong., 1st Sess., Rep. No. 130, Feb. 7, 1916. See also note 31, *In Re Yamashita*, 327 U. S. 1, 65.)

Respondent points (pp. 48-50) to Article of War 60 of the 1874 Code (prohibiting frauds against the United States) and states that the Attorney General has ruled that a civilian was not considered as being a person "in the military service" and therefore not punishable for a violation of Article of War 60. Winthrop, in that part of his treatise which relates to Article of War 60 of the 1874 Code, stated directly the contrary. He said (p. 698):

> "The Act, which was of a comprehensive character, provided not only for the trial of military and naval persons charged with the offenses specified in the first

section, but also for the prosecution both by *qui tam* action and criminal proceedings of 'civilians' similarly accused."

Winthrop, in his discussion of the 63rd Article of War (pp. 98-100), says that it denominated certain groups of civilians who were made amenable to all the provisions of the then existing Articles of War, excepting those Articles which by their very terms apply exclusively to officers and soldiers.

Respondent states (p. 51): "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops." Just what reasons of policy preclude soldiers of the occupying force from being subjected to trial before the courts here under attack and at the same time compel civilians, who are subject to military law, to be so subjected, are not made known. Apparently Respondent wishes to adhere to its former position that *power* to subject, even soldiers, to this type of tribunal exists (see Footnote 12, p. 20, Resp. Brief Cert.) but that presently the military commanders prefer not to exercise *such power*. If this Honorable Court accepts the proposition that *such power* exists, and that soldiers and civilians alike, may be subjected to trial before any forum the commanding general chooses to select and for violation of any law or military directive he may choose to apply, we have moved far along the road to military dictatorship. If this is the law, then practically no obstacle lies in the path of a would-be Caesar.

Respondent's argument (pp. 52-57 inclusive) that a civilian type tribunal, rather than courts martial, should be employed in an occupied area, should have been addressed to the law-makers and not the judiciary. Congress has decreed the manner in which, all persons within the pur-

view of Article of War 2, shall be tried. It has declared the substantive law applicable to such trials, as well as the rules of procedure and review. Nowhere has Congress provided for so-called civilian type tribunals, nor did Congress act unwisely in not authorizing such courts. While Respondent speaks with praise of the system established, many highly experienced American lawyers, who have appeared before those tribunals, speak otherwise.

If, as Respondent contends (p. 54), a judicial system, wholly free of the basic and statutory laws of the mother country and subject exclusively to the will of one man, was employed to teach democracy to Germans, counsel fear the Germans have been taught the wrong type of democracy.

Lengthy references are made to what the British have done in their zone. Counsel do not here intend to discuss British law. Suffice it to say that from what appears in Respondent's Brief, the British have inaugurated a system whereby the accused may at least be tried by a jury of his peers. Furthermore, under the system set up in the British Zone, only persons "not otherwise subject to military law" (Resp. Brief, p. 54) are amenable to trial before those courts.

Respondent argues (p. 56) that Petitioner does not contend that she was deprived of "any element of due process of law." Apparently Respondent misinterprets the entire basis of this appeal. Petitioner contends that she was not tried according to law by a tribunal established by law, and that she was not permitted appeal in accordance with law. Furthermore, she contends that she was tried for a violation of substantive law to which she was not subject. All the elements of due process, which were denied her in the course of the proceedings and which appear in her record of trial, have been *designedly* omitted so as not to confuse the basic issues. Either the commanding general (in this case, a State Department official) had the right to make his own laws for her trial, or he did not have such right. If, as Petitioner contends, he did not have, then

every step taken with respect to her trial constituted a denial of due process.

Respondent makes the argument and quotes at length from Congressional hearings (pp. 58-66) to show that Congress, with knowledge of the system employed in Germany, re-enacted Article of War 15. Congress was expressly told (Resp. Brief, p. 63) that the tribunals in Germany were established for the trial of "civilians who are *not* subject to the Code (Uniform Code of Military Justice)." By merely re-enacting the statute, Congress did not thereby place its stamp of approval on what was done in Germany, nor did Congress thereby intend to permit any improper application of the statute. In any event, Congress is without power to take from this Honorable Court the duty and responsibility of judicially determining the validity and Constitutionality of the acts complained of in this case.

Respondent states at length (pp. 66-75) her reasons for justifying the existence of this heretofore unheard of type of military tribunal. A new and novel theory is advanced, namely, that only in the case of the trial of a soldier, must the military commission be established by competent military authority (pp. 67-68). Of course no authority is cited for this proposition. In any event the ruling of this Honorable Court in *In re Yamashita, supra,* is directly to the contrary. Respondent refers to *Handlin* v. *Wickliffe,* 12 Wall. 173, where it would appear that a civilian, in the capacity of military governor, appointed a military commission, and she draws the conclusion that Mr. McCloy, a State Department official, was likewise so empowered. There is a substantial difference between a civilian who acts as military governor of an area, and a civilian whose functions are limited to merely supervising the activities of the restored German Government (see pp. 3-5 of Petition for Cert.). Nowhere is it claimed that Mr. McCloy was acting as military governor at the time Petitioner was brought to trial. Respondent would like such inference to

be drawn (pp. 67-68), but on the facts in this case it cannot be drawn.

Respondent seeks to justify the application of the German Criminal Code to the trial of Petitioner, a person subject to military law, with the statement that it was appropriate, because Germans and other United Nations nationals were more familiar with the continental code (p. 70) and that by applying German law to everybody, including Petitioner, a uniform system was put into operation. It is difficult to understand the theory of international law, advanced by Respondent, that the citizens of a victorious and conquering nation should be treated in the same manner as the enemy inhabitants who were recently subjugated by force. The law is to the contrary (*Coleman* v. *Tennessee, supra*).

Respondent stipulated (R. 27-28) that Petitioner herein enjoyed all the privileges and immunities of persons in the Armed Forces of the United States and that she enjoyed all the immunities from German jurisdiction granted persons in the Armed Forces of the United States. If, as Respondent now contends, Petitioner was nevertheless amenable to German Law, then other persons, including the soldiers and officers of our occupying forces, were equally amenable to German Law. Officers, soldiers and others accompanying the Army must therefore familiarize themselves with the laws of the various countries through which they move in order to be free of punishment for a violation thereof. Such is not now and never has been the rule of international law (see authorities cited in Pet. Brief in Support of Cert., pp. 31-35).

Lastly, Respondent says Petitioner does not claim that the procedure at her Trial was less fair than that of court-martial, but merely that it was different. Petitioner claims that neither the creation or composition of the court, nor the procedure upon trial or review, was according to law, and that the question of the fairness or unfairness of the action taken does not raise a legal question. The fact is that Petitioner was singled out for trial before this

particular tribunal. Counsel has personally acted as attorney for a number of civilians who were within the purview of Article of War 2, on their trials before courts-martial in Germany. In fact, hundreds of civilians, who fell within the purview of Article of War 2, have been tried by courts-martial during the period in question. The "startling" results which Respondent claims (Resp. Brief Cert., p. 25) would follow from the trial of civilians before court-martial goes for naught in the light of what actually has happened. There is nothing startling or unusual about courts-martial trials.

Special courts-martial (trials involving lesser offenses) have been known to dispose of as many as twenty cases and more in a day with all the safeguards authorized by law fully protected. Trials before general courts-martial have consumed longer periods of time depending upon the case. Courts-martial are fully capable of handling all business which may come before it with dispatch and with all the protection which the Constitution and Laws of the United States afford to an accused. There was, in fact, no need to resort to the system established in Germany for the trial of Americans, Respondent's unsupported statements to the contrary, notwithstanding.

VIII. *Conclusion.* The judgment of the Court below should be reversed and the writ of *habeas corpus* heretofore issued should be sustained.

Respectfully submitted,

JOSEPH S. ROBINSON,
DAYTON M. HARRINGTON,
JAMES D. GRAHAM, JR.,
JOHN C. MORRISON,
Counsel for Petitioner.

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No. 62 Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1951

YVETTE J. MADSEN, PETITIONER

v.

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1951

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v.

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 209-217[1]) is reported at 188 ~~F. 2d 272~~. The opinion

[1] The record in the Court of Appeals below has been certified to this Court in two parts. The first part contains the proceedings in the District Court for the Southern District of West Virginia (pp. 1-202) and proceedings in the Court of Appeals for the Fourth Circuit (pp. 203-221). The second part contains the printed joint appendix below (pp. 1-114),

of the District Court (R. 78-93) is reported at 93 F. Supp. 319.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1951 (Tr. 218). On June 25, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including July 31, 1951. The petition was filed on July 26, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether courts-martial have exclusive jurisdiction, as against the United States Court of the Allied High Commission, in a case of murder committed by the civilian wife of a United States Air Force officer residing with him in the United States Area of Control in Germany.

2. Whether the tribunal by which petitioner was convicted of murder was a lawfully constituted military tribunal.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitution, Art. II, Sec. 2 provides:

> The President shall be Commander in Chief of the Army and Navy of the United States * * *.

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other proceedings in the Court of Appeals (pp. 115-130), and the stipulation with respect to the record in this Court (pp. 131-132).

The designation "Tr." refers to the first part of the record and the designation "R." refers to the printed joint appendix.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> Art. 2 [10 U.S.C. 1473]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
>
> * * * * *
>
> Art. 12 [10 U.S.C., Supp. IV, 1483]. General courts martial.
>
> General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these

articles, and any other person who by the law of war is subject to trial by military tribunals * * *.

Art. 15 [10 U.S.C. 1486]. Jurisdiction not exclusive.

The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U.S.C. Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

Art. 92 [10 U.S.C. Supp. IV, 1564]. Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not premeditated, he shall be punished as a court-martial may direct. * * *: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Fourth Circuit (Tr. 218) affirming an order of the District Court for the Southern District of West Virginia (Tr. 196-197) refusing to discharge petitioner in a habeas corpus proceeding. The petition for a writ of habeas corpus (R. 3-8) challenged the jurisdiction of a tribunal, originally known as the "United States Military Government Court for Germany", later known as the "United States Court of the Allied High Commission for Germany", to try and sentence petitioner upon a charge that, on October 20, 1949, in the United States Area of Control in Germany she shot and killed her husband, a Lieutenant serving in the United States Air Force (R. 34, 79).

The proceeding was tried upon the basis of

exhibits and an agreed statement of facts (R. 27-78), which may be summarized as follows:

Petitioner is a citizen of the United States. In or about the month of November 1947, she and her husband entered the American Zone of Occupied Germany (R. 27).[2]

Military government was established in Germany by General Eisenhower in July 1945 (R. 102-103). By Military Government Proclamation No. 2, dated September 19, 1945, "the German law in force at the time of the occupation" was declared "applicable in each area of the United States Zone of Occupation", except as repealed or superseded by the Military Government or other competent authority (R. 103). The composition, jurisdiction, and procedure of the military courts were set forth in Military Government Ordinance No. 2 (R. 100-101). Military courts had jurisdiction "over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law * * *." The courts had jurisdiction, *inter alia,* over:

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[2] Petitioner was transported to Germany by the Army and she and her husband were granted billets requisitioned by the Army for military use. She was permitted use of facilities maintained by the Army for its personnel. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States (R. 27-28).

It is to be noted that certain immunities from the jurisdiction of German courts were granted to nationals of the United Nations or to "members of the families" of the armed forces by Military Government Law No. 2 and Allied High Commission Laws Nos. 2 and 13 (R. 102, 111-112, 113) without regard to whether such members were or were not persons "accompanying" the armies under AW 2(d).

(i) All offences against the laws and usages of war.

(ii) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

(iii) All offences under the laws of the occupied territory or of any part thereof.

Military Government Law No. 2 stated that the courts of Germany were denied jurisdiction over "[c]riminal cases involving * * * a dependent accompanying [any person serving with the Armed Forces of any of the United Nations], or [a]ny national of the United Nations * * *" (R. 102). By Military Government Ordinances Nos. 31, 32, and 33 (14 Fed. Reg. 124-133), effective August 18, 1948, the court system was revised to establish the United States Military Government Courts for Germany upon a district basis with a Court of Appeals for the United States Area of Control (R. 104-105). Jurisdiction as to persons was continued as before, with the additional provision, *inter alia*, "No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander-in-Chief, European Command" (R. 105-106). On December 11, 1948, by command of General Clay, Commander-in-Chief of the European Command, United States Army, authorization was given "for trial of any dependent of a member of the United States Armed Forces * * *

for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters has directed trial by Court Martial" (R. 71).

In April 1949, the Governments of the United States, the United Kingdom, and France agreed to the establishment of a provisional, limited German Federal Republic in their zones and to the establishment of an Allied High Commission composed of one High Commissioner of each of the three occupying powers as the supreme agency to exercise control. This plan became effective September 21, 1949, and the supreme authority in the United States Area of Control became the United States High Commissioner appointed by the President. Offices and officials with new titles were established under the Office of the United States High Commissioner for Germany. However, former military government laws remained in effect unless specifically changed, and the courts established under Military Government Ordinance No. 31 became responsible directly to the United States High Commissioner. Courts of the German Federal Republic, as before, were not allowed jurisdiction over members of families of occupation force personnel.[3]

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[3] Certain details of the above steps taken in 1949 may be set forth as follows:

By Executive Order of the President 10062, dated June 6, 1949, the position of United States High Commissioner was created. The order provided, *inter alia*, that the Commissioner

The foregoing organizational structure was in effect on October 20, 1949, when petitioner was

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should be "the supreme United States authority in Germany," and further provided, *inter alia* (R. 58-59):

"* * * The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the governmental functions of the United States in Germany (other than the command of troops) * * *.

"3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

"4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements."

The Occupation Statute and the Charter of the Allied High Commission for Germany, which became effective September 21, 1949 (R. 52-53, 108-109), provided, *inter alia*, that the German people should enjoy "self-government to the maximum possible degree consistent with [the] occupation," but reserved powers in various fields, including "Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities" and "Control * * * over the carrying out of sentences" imposed by "courts or tribunals of the occupying Powers or occupation authorities" and over "amnesty, pardon or release," and reserved general authority to the occupying Powers to "resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in

arrested by military police. On October 21, 1949, she was charged with murder under Section 211 of the German Criminal Code before the United

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Germany or in pursuance of the international obligations of their Governments." The Statute also provided that "[l]egislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities * * *." (R. 109-111.)

Under the Charter of the Allied High Commission "all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany" would be "transferred to the three High Commissioners respectively to be exercised in accordance with the provisions [of the Charter] and of the Occupation Statute" (R. 41). It was provided that each High Commissioner should be responsible to his Government with respect to his zone for the matters in fields reserved to the occupation authorities, including, *inter alia*, fields mentioned *supra* and "administration of justice in cases falling within the jurisdiction of Allied Courts" (R. 50). On September 21, 1949, by Staff Announcements Nos. 1 and 5, the "Office of the U. S. High Commissioner for Germany" was established, the authority residing in the "U. S. Military Governor" and the "Office of Military Government for Germany (U.S.)" was assumed by the High Commissioner, and it was provided that the courts functioning under Military Government Ordinance No. 31 (see *supra*, p. 7) were to form "an independent judicial unit responsible directly to the United States High Commissioner" (R. 67-69).

In the organization chart forming part of Staff Announcement No. 1, the United States Military Government Courts for Germany appeared under the title "U. S. High Commission Courts," and in Staff Announcement No. 5, the courts were referred to as "The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Government Ordinance No. 31)," although the official change of name was not made effective until January 1, 1950 (R. 67-69, 114).

Somewhat similarly to the earlier Military Government Law No. 2 (see *supra*, p. 7), Allied High Commission Law No. 13, effective January 1, 1950 (15 F. R. 1056), in conjunction with Allied High Commission Law No. 2, September 21, 1949 (14 F. R. 7457), prohibited exercise of jurisdiction by German courts over "members of the families" of members of the occupation forces (R. 111-113).

States Military Government Court.[4] A summons containing a copy of the charge and particulars was personally served upon her (R. 28).[5] After a preliminary hearing at which petitioner and her counsel were present, petitioner was held for trial (R. 29). She was brought to trial on February 20, 1950 (R. 30). In accordance with United States Military Government Ordinance No. 31 (R. 105), the court before which petitioner was tried was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate (R. 30). The court adjudged petitioner guilty as charged and, under the applicable provisions of the German Criminal Code, sentenced petitioner to 15

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[4] Section 211 of the German Criminal Code reads as follows in English translation (R. 29):

Murder—Mord

211. (*As in force prior to 4 September 1941*). Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.

211. (*As amended 4 September 1941, RGBI I, 549*). The murderer shall be punished by death.

A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);

For the satisfaction of sexual desire;

For cupidity (Habgier) or any other base motives;

In a treacherous or cruel manner or by means causing common danger, or

In order to make possible or to conceal another offense.

If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed.

[5] The agreed statement of facts also recites that a copy of "the charges" was served on petitioner on November 1, 1949 (R. 30). This copy, including notice of "Rights of the Accused" appears at R. 34-36.

years of confinement (R. 30-31). The United States Court of Appeals of the Allied High Commission for Germany affirmed the judgment of the lower court (R. 36-37).[6] After the petitioner was brought back to the United States to serve her sentence, she filed the petition for a writ of habeas corpus involved in this proceeding.

ARGUMENT

1. Petitioner's basic contention is that she was entitled to be tried by court-martial, rather than by any other military tribunal. She argues that she was a person "accompanying" the armies and therefore a "person subject to military law" within the definition of AW 2(d), and that exclusive jurisdiction was conferred upon courts-martial by the provision in AW 92 that a "person subject to military law" committing murder shall be punished "as a court-martial shall direct."

It is the Government's position that petitioner's contention concerning the exclusive jurisdiction of a court-martial is clearly negated by the following specific language of AW 15:

> The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions,

[6] The higher court, however, changed the part of the judgment committing petitioner to "The Federal Reformatory for Women, Alderson, West Virginia or elsewhere as the Secretary of the Army may direct," so that petitioner was committed to the custody of the Attorney General of the United States or his authorized representative. The above reformatory was then designated as the place of confinement by the Director of the Bureau of Prisons (R. 66).

> provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

The legislative history shows that this article was inserted for the express purpose of precluding the exact contention which petitioner now makes, i.e., that the inclusion in AW 2, as subject to military law and thus to trial by court-martial, of persons theretofore subject to trial by military commissions confers exclusive jurisdiction on courts-martial.

Speaking in 1912 and 1916 in support of the enactment of AW 15, General Enoch H. Crowder, Judge Advocate General of the Army stated:

> * * * There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent. [S. Rep. 229, 63d Cong., 2d sess., p. 53.]
>
> * * * * *
>
> Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by mili-

tary commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced: [quoting AW 15] [S. Rep. 130, 64th Cong., 1st sess., p. 40.]

This Court has summarized the objective of AW 15, as follows (*In re Yamashita*, 327 U.S. 1, 19):

> * * * Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. * * *

Clearly, therefore, the fact that petitioner may be a person subject to military law under Article 2 does not preclude her trial by military commission. The only question is whether she is a person who

would have been subject to trial by military commission when Article 15 was enacted.

The various military tribunals other than courts-martial have been a recognized element of military law since the beginning of United States history. Under the common law of war and the constitutional powers of the President as Commander-in-Chief (Const. Art. II, Sec. 2), the military authorities have had both the right and the duty to preserve order and to protect life and property within the area of their activities, including, of course, the lives and property of the military forces. Military tribunals other than courts-martial have historically constituted the means of discharging a large portion of this duty, notably in the case of offenses that were not of a routine military nature and in the case of offenders who were not in the military service.

During the Mexican War, General Scott, in an order of February 19, 1847, provided that various offenses, including murder, committed "by any inhabitant of Mexico, sojourner or traveller therein" or "*by any individual of the* [*United States*] *forces, retainer or* follower of the same" (emphasis supplied) upon another inhabitant, sojourner, or traveler, or upon "any other individual of the same forces," retainer or follower of the same, should be brought to trial before "military commissions." The basis was stated to be the "unwritten code all armies in hostile countries are forced to adopt," referring to the army's "own safety" as well as to

protection of inhabitants against injuries, on the part of the army, "contrary to the laws of war." Birkhimer, *Military Government and Martial Law* (3d Ed., 1914) App. I, pp. 581-582; Winthrop, *Military Law and Precedents* (2d Ed., 1896), pp. 1297-1299. At the same time, General Kearney, upon the conquest of New Mexico, established circuit courts and an appellate court. The jurisdiction of the circuit courts was declared to embrace all criminal cases not otherwise provided for by law and all civil cases not cognizable before the prefects and alcades. The court system, tested in a civil case, was declared valid by this Court and held to be revoked only by direct legislation of Congress or of the Territorial Government. *Leitensdorfer* v. *Webb,* 20 How. 176, 178.

In the Civil War, military commissions were convened as early as 1861 and were extensively employed and recognized throughout that war and the periods of military occupation thereafter. Winthrop, *op. cit.* 1299. A Provisional Court for Louisiana was established by Executive Order of President Lincoln on October 20, 1862, with a civilian judge and with jurisdiction of both civil and criminal causes. Its civil jurisdiction was sustained by this Court in *The Grapeshot,* 9 Wall. 129, 132-133, and sustained for a period beyond the cessation of hostilities in *Burke* v. *Miltenberger,* 19 Wall. 519, 524-525. Its criminal jurisdiction in a murder case was specifically considered and upheld by the Provisional Judge in an extensive,

carefully reasoned opinion, *United States* v. *Reiter*, 27 Fed. Cas. No. 16146 (Prov. Ct. La.). The appointment of a civilian judge by a civilian acting as military governor was treated as valid by this Court in *Handlin* v. *Wickliffe*, 12 Wall. 173, 174-175. The Provost Court of New Orleans, established by the department army commander on May 2, 1862, was held to be validly constituted in *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 296.

The various Mexican and civil war military tribunals tried over 2,000 cases including over 100 women. Murder and other civil crimes were tried, and camp-followers and other civilians accompanying or serving with the armies were frequently brought before the commissions. Winthrop *op. cit.* 1252-1253, 1299, 1302, 1308, 1309-1310.

Further precedents are to be found in the military tribunals employed in Cuba and Puerto Rico during and after the Spanish war. Their validity was clearly sustained by this Court. *Neely* v. *Henkel*, 180 U.S. 109, 121, 123; *Santiago* v. *Nogueras*, 214 U.S. 260, 266. And see *Ex parte Ortiz*, 100 Fed. 955, 963 (C.C. D. Minn.). Jurisdiction of military tribunals was upheld as to the crime of embezzlement on the part of an American citizen in *Neely*, and with respect to murder of an Army private by a native Puerto Rican in *Ortiz*.[7]

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[7] Petitioner's contention (Pet. 51) that no question of the legality of military courts was raised in *Neely* is based upon a misapprehension of a statement of this Court (p. 122). This Court stated that it was unnecessary to consider at length the Congressional power to enact an extradition statute

It is thus evident that military commissions were used, not only to try offenses against the *laws* of war,[8] but to punish civilian crimes where the "law of war" made it necessary for such punishment to be handled by military authority. As a matter of fact, ordinary "civilian" crimes such as murder, even when committed by soldiers and officers, were not made punishable by court-martial until 1863. Hence, where such a crime was not committed in the jurisdiction of a civilian court, the offense had to be punishable by some other military tribunal. In 1847, during the Mexican war period, a United States Army captain who was alleged to have murdered another was charged before a military commission. Winthrop, *op. cit.* 1298.

The Act of March 3, 1863, c. 75, sec. 30, 12 Stat.

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with respect to Cuban offenses, because the enactment was clearly supported by a treaty. But the legality of the enactments of the military government was clearly in issue (see pp. 122-123), as was also the validity of the military government's grant of jurisdiction to the former "ordinary courts of criminal jurisdiction" (p. 118), since extradition was available only with respect to violations of "criminal laws in force" in Cuba (p. 111). This Court, also, was confronted with the contention that Cuba had attained such sovereignty that the military government was no longer valid. The contention was rejected (pp. 123-125). Lastly, petitioner contends that the American citizen in Neely "had no connection, directly or indirectly, with our armed forces" (Pet. 51). On the contrary, Neely was Finance Agent of the Department of Posts in Havana. He was an employe of the military government (see 180 U.S. at 118-119, and United States brief, O.T. 1900, No. 387, p. 6) and his offense was not only an offense under the former Spanish law but also under the Postal Code promulgated by direction of the Military Governor (180 U.S. at 118-119).

[8] Thus, military commissions have historically been used to try spies and offenders against the laws of war. *Ex parte Quirin*, 317 U.S. 1; *In re Yamashita*, 327 U.S. 1, 19.

731, 736, did however provide that, in time of war or rebellion, murder, manslaughter, robbery, larceny, and certain other specified crimes, "when committed by persons who are in the military service" should be "punishable by the sentence of a general court-martial or military commission."[9] When this provision first appeared as an Article of War (AW 58) in the revision of 1874 (R. S. Sec. 1342), the words "or military commission" were omitted.[10]

The only possible foundation for petitioner's position would be the argument that, by omitting in 1874 the provision for trial by military commission of persons "in the military service," Congress intended to invest courts-martial with exclusive jurisdiction as against military commissions to try persons "in the military service" for the crimes of murder, larceny, etc. in time of war. Petitioner must then argue that she is a person "in the military service." We submit that petitioner clearly was not "in the military service."[11] Mani-

[9] The opinions in 1 Records, J.A.G. 468, 7 Records, J.A.G. 440, 486, 9 Records, J.A.G. 236, and 15 Records, J.A.G. 373 cited by petitioner from the Civil War years (Pet. 38-39, fn. 26) merely hold that even under the statute, purely military offenses by persons *in* the military service were to be tried by court-martial.

[10] Winthrop at one point (*op. cit.* 1032, fn. 4) speaks of the omission as "proper" because such a commission "is not the appropriate tribunal for the trial of *military* persons." At a later point, Winthrop characterizes the omission as "apparently inadvertent" (*op. cit.* 1300, fn. 4).

[11] The question of whether in 1874 court-martial jurisdiction was made exclusive, as against military commissions, for persons "in the military service", is thus not involved in this case.

festly, the broadened definition in 1916 of persons subject to military law under Article 2 did not place all such persons "in the military service." At the very most, petitioner would have the status of a retainer to the camp[12] and not that of a person "in the military service." Furthermore, as the District Court below pointed out (R. 91-92):

> No case has been brought to my attention involving the trial of a soldier's wife by a military commission; but no difference is perceived between her status prior to the 1916 amendment and that of any other civilian who might be accompanying the army although not connected with it in any of its activities; and since military tribunals undoubtedly had jurisdiction to try such other persons for violations of local criminal laws, this jurisdiction would necessarily extend to the wives of soldiers. It is true that some support may be found in Winthrop's treatise for the theory that wives who accompanied their soldier husbands were to be regarded as "retainers to the camp" (see Winthrop, [*op. cit.*, 133, fn. 7]); but this conception of a wife's function, which may have been tenable in more primi-

[12] The authorities relied upon by petitioner (Pet. 19) to the effect that a wife could be tried by court-martial tend merely to show that a wife commorant with the army was regarded as a camp follower. The only case cited in which such a wife was tried by a British court-martial was an instance in India in 1825 when the status of a wife was very different from her position in 1916. In any event, the fact that a wife may have been so regarded manifestly does not establish that she could not be tried by military commission since, as pointed out above, even soldiers could be tried by military commission for civilian crimes.

> tive times, had certainly lost its force long prior to the year 1916. No one, being realistic, could say that at that time a wife who accompanied her husband on a tour of duty in the army was a "retainer to the camp."

It is true that the amendments of 1916 not only broadened the designation of "persons subject to military law" in AW 2, but also, by AW 92 and 93, made punishable by court-martial an extensive group of crimes, including murder, which had previously, under AW 58, been punishable by court-martial only when committed by persons "in the military service." Thus, after 1916 a person accompanying the armed forces could in time of war or outside the geographical limits of the United States be tried by a court-martial for murder, while before 1916 he could not have been so tried. It was precisely because of that situation, to which General Crowder adverted in his statement (see, *supra,* pp. 13-14), that it was necessary to enact Article 15 preserving concurrent jurisdiction in military commissions. In addition to the statements quoted above, General Crowder said (S. Rep. No. 130, 64th Cong., 1st sess., p. 40):

> It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. * * *

Under petitioner's contention (Pet. 37-38), that only offenders or offenses not covered by the Articles of War are now to be dealt with by military tribunals other than courts martial, there would be no "concurrent" jurisdiction, but rather an exclusive jurisdiction of courts-martial for all cases punishable under the Articles of War, and a separate jurisdiction of military tribunals for cases not punishable under the Articles. This latter jurisdiction would not require such an enactment as AW 15, for such jurisdiction would exist by necessity and the law of war to deal with cases outside the jurisdiction of courts-martial. In any event, petitioner's argument, which would make surplusage of the language of AW 15 preserving "concurrent jurisdiction,"[13] falls before the express language of the statute and the very full explanation of its purpose by General Crowder (*supra*, pp. 13-14, 21).

Significantly, when Congress, in 1950, reenacted Article 15 without change as Article 21 of the Uniform Code of Military Justice (50 U.S.C.,

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[13] The mere existence of court-martial jurisdiction is, of course, not intrinsically exclusive of other jurisdiction, *e.g.*, the jurisdiction of District Courts in the United States. *Caldwell* v. *Parker*, 252 U.S. 376, 387-388. Nor do the authorities cited by petitioner support her contention that court-martial jurisdiction is exclusive even where such a mandate as AW 15 is not present. Thus, the decisions in *Coleman* v. *Tennessee*, 97 U.S. 509, and *Dow* v. *Johnson*, 100 U.S. 158, 165, held only that the soldiers and officers of a conquering force were not subject to trial by the enemy; they did not involve trial, as here, by the offenders' own military government.

Supp. IV, 581) it did so with full knowledge that Article 15 had been applied in occupied territory as permitting the trial of American civilians before military government courts such as the court by which petitioner was tried. Both the Senate and House Committees on Armed Services were advised of the creation and operation in occupied territory of military government courts (provost courts in Japan) exercising criminal jurisdiction over American civilians. *Hearings before Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. entitled Uniform Code of Military Justice,* p. 161; *Hearings before Subcommittee of House Committee on Armed Services, 81st Cong., 1st Sess., entitled Uniform Code of Military Justice,* pp. 875-877, 975. Thereafter, both committees reported that "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex Parte Quirin,* 317 U.S. 1 (1942))." S. Rep. 486, 81st Cong., 1st Sess., p. 13; H. Rep. 491, 81st Cong., 1st Sess., p. 17.

2. Petitioner contends that the tribunal before which she was convicted was not a duly constituted military tribunal. She argues (Pet. 52-56; also 39, 41-42) that the tribunal must be created by the same commanders as are empowered to appoint general courts-martial, that it must be composed

of officers of the Army, and that it must follow the practice and procedure of a court-martial, citing Winthrop, *op cit.* 835; the 1943 War Department Field Manual, FM 27-5;[14] the 1949 Manual for Courts-Martial, Chap. 1, par. 2; Dig. Op. Judge Adv. Gen. 1912, p. 1070, and various decisions and articles in periodicals. The cited authorities do not support petitioner's contentions but constitute at most suggestions and recommendations for practice with respect to military tribunals.[15]

Petitioner also relies heavily upon this Court's suggestion in *In re Yamashita*, 327 U.S. 1, 20, that the Articles of War govern the trial before military commissions of "persons subject to military law as enumerated in AW 2" (Pet. 52). In that case, the Court held that AW 25 and AW 38 did not preclude the use of depositions and hearsay evidence in the trial before a military commission of a person other than those enumerated in AW 2. Assuming that such of the Articles of War as AW 25, which specifically refer to military tribunals generally, apply to the trial by any military tribunal of persons enumerated in Article 2, it

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[14] This Manual has been superseded by the 1947 Manual FM 27-5, October 14, 1947, which no longer contains even the language which petitioner urges as supporting her contentions.

[15] For example, it is true, as contended by petitioner (Pet. 41), that General Crowder, in 1916, referred at one point to courts-martial and other military tribunals as having "the same procedure" but the remark was clarified in the same discussion by his quotation from Winthrop describing the procedure as only an "analogy of courts-martial" (S. Rep. No. 130, 64th Cong., 1st sess., p. 40).

by no means follows that the composition and procedure of military tribunals other than courts martial must be governed in all other respects by the Articles of War. Clearly, such a result is not required by AW 38 which merely *authorized* the President to prescribe the procedure of "courts-martial, courts of inquiry, military commissions, and other military tribunals"—authority which he has never exercised except with respect to courts martial. Since the Manual for Courts-Martial (1949) is expressly limited to the proceedings of courts martial, it is evident that the President has not exercised his authority to prescribe uniform rules for other military tribunals, but, through his military and occupation commanders, has adopted procedures suitable for particular situations. Moreover, such a complete assimilation of all types of military tribunals to courts martial would render meaningless the choice of tribunals which AW 15 sought to preserve in those cases which prior to 1916 were not triable by courts martial.

Petitioner does not allege violation of AW 25 or of any other specific command of the Articles of War applicable to all military tribunals. Instead she contends that she was entitled to be tried by a court composed of Army officers appointed by a military commander empowered to appoint general courts martial, and in accordance with the procedures specified in the Articles of War. The consequences of this contention, if sustained, would be startling. There have resided in the United

States Zone of Occupied Germany thousands of civilian employees of the United States and their dependents, together with the civilian dependents of members of the occupying armed forces, plus a number of American citizens visiting or staying in Germany for their own purposes. As a substitute for the withdrawn jurisdiction of German criminal courts, a large number of these persons could have been subjected to the criminal jurisdiction of army court martials. Instead, the American occupation authorities instituted a system of courts exercising civil and criminal jurisdiction, staffed with civilian judges experienced in American civilian law, and employing procedures embodying every basic procedural right of American civilian law except trial by jury. An appeals court of civilian judges was also established.[16] We submit that this system for administering justice among the many American civilians in occupied Germany is more consistent with our fundamental political ideals than would be the relegation of this function to purely military courts.[17] We believe that only the clearest of

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[16] The composition and procedure of these courts are prescribed in Military Government Ordinances 31, 32 and 33. 14 Fed. Reg. 124-133.

[17] There was clear precedent for appointment of a civilian as military governor or as judge of a military tribunal. (See *The Grapeshot*, 9 Wall. 129; *Handlin* v. *Wickliffe*, 12 Wall. 173; *Pennywit* v. *Eaton*, 15 Wall. 380; *Burke* v. *Miltenberger*, 19 Wall. 519; *United States* v. *Reiter*, 27 Fed. Cas. No. 16146; *Winthrop, op. cit.* 1250-1251, noting the appointment of civilians as military governors in three states in 1862 and in seven states in 1865; 1 Hackworth *Digest of International Law*, 148-149, noting the appointment of a civilian as military governor of Cuba in 1906).

commands in the Articles of War could preclude the President and his military commanders from taking such enlightened action. We have pointed out that nothing in AW 38 compels such a result. Also, we urge that nothing in General Crowder's testimony on the 1916 revision of the Articles of War, cited in the Court's opinions in *In re Yamashita, supra,* need be construed as evidencing a purpose to assimilate all types of military tribunals to courts martial in those cases which prior to 1916 could not be tried by courts martial at all, but only by common law military tribunals. Most important of all, Congress, with at least general knowledge as to the system of military government courts established in Germany, reenacted Article 15 in 1950 without indicating any disapproval of this use of "concurrent jurisdiction".[18]

Petitioner contends that the military tribunal here in question was functioning in an area where military law had ceased to exist (Pet. 3-4, 21, fn. 13, pp. 56-59). The contention is urged principally upon the basis of the new titles given to the military government and courts in 1949 and upon the basis of lay language from public announcements concerning the resumption of a limited degree of self-government by the Germans. It is, however, a misapprehension even of language, to say nothing of actualities (see pp. 8-10, *supra*), to claim that military occupation of Germany had been termi-

[18] See, particularly, Fairman, *Some New Problems of the Constitution Following the Flag,* 1 Stanford L. R. 587, 626-630.

nated in 1949. The test of the nature of both the government and its tribunals is to be found in the ultimate basis of authority. In Germany that basis has been clearly military conquest and continued military occupation.[19] When a similar contention was made in *Neely* v. *Henkel, supra,* this Court replied that it was "the function of the political branch of the Government to determine when such occupation and control shall cease." 180 U.S. at p. 124.[20]

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[19] Grants of limited, provisional power to the Germans were not made for the first time in 1949; such grants were made at the outset of military government. See Proclamation No. 2, Art. III, September 19, 1945 (12 F. R. 6997).

[20] Congress has expressly recognized that the President may carry out the government of occupied territories through other departments than the Department of Defense without thereby changing the fundamentally military basis of the occupation. In appropriating funds to the Department of the Army (Act of October 6, 1949, c. 621, 63 Stat. 709, 712), Congress specifically provided that "the President may transfer to any other department or agency any function or functions provided for under this appropriation." And see Winthrop, *op. cit.* 1246, 1249-1250.

CONCLUSION

The decision below is correct and no conflict of decisions is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT W. GINNANE,
Special Assistant to the Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

OCTOBER 1951.

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No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1951

YVETTE J. MADSEN, PETITIONER

v.

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

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No. 411

YVETTE J. MADSEN, PETITIONER

v.

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 116–124 [1]) is reported at 188 F. 2d 272. The

[1] The record in the Court of Appeals below has been certified to this Court in two parts. The first part contains the proceedings in the District Court for the Southern District of West Virginia (pp. 1–202) and proceedings in the Court of Appeals for the Fourth Circuit (pp. 203–221). The second part contains the printed joint appendix below (pp. 1–114), and the proceedings in the Court of Appeals (pp. 115–125), and has been printed.

The designation "Tr." refers to the first part of the record and the designation "R." refers to the printed record.

opinion of the District Court (R. 78–93) is reported at 93 F. Supp. 319.

JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1951 (R. 125). On June 25, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including July 31, 1951 (R. 125). The petition was filed on July 26, 1951, and was granted on November 5, 1951 (R. 126). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the United States Court of the Allied High Commission had jurisdiction to try for murder committed in Germany the civilian wife of a United States Air Force officer residing with him in the United States area of control in Germany.

2. Whether the tribunal by which petitioner was convicted of murder was lawfully constituted and employed lawful procedures.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved are set forth in the Appendix, *infra*, pp. 77–79.

STATEMENT

Petitioner was tried and convicted by the tribunal originally entitled the "United States Mili-

tary Government Court for Germany," later entitled the "United States Court of the Allied High Commission for Germany," upon the charge that on October 20, 1949, in the United States Area of Control in Germany, she shot and killed her husband, a lieutenant serving in the United States Air Force (R. 30, 34, 36–37). Petitioner instituted habeas corpus proceedings in the District Court for the Southern District of West Virginia, challenging the jurisdiction of the tribunal which tried and sentenced her (R. 3–8). The District Court refused to discharge petitioner (Tr. 196–197) and its decision was unanimously affirmed by the Court of Appeals for the Fourth Circuit R. 116–125). The habeas corpus proceeding was tried upon the basis of exhibits and an agreed statement of facts (R. 27–78), which may be summarized as follows:

Petitioner is a citizen of the United States. In or about the month of November 1947, she and her husband entered the United States Zone of Occupied Germany (R. 27).[2]

[2] Petitioner was transported to Germany by the Army, and she and her husband were granted billets requisitioned by the Army for military use. She was permitted use of facilities maintained by the Army for its personnel. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States (R. 27–28). Certain immunities from the jurisdiction of German courts were granted to nationals of the United Nations or to "members of the families" of the armed forces by Military Government Law No. 2 and Allied High Commission Laws Nos. 2 and 13 (R. 102, 111–112, 113).

Military government had been established in Germany by General Eisenhower in July 1945 (R. 102–103). By Military Government Proclamation No. 2, dated September 19, 1945, "the German law in force at the time of the occupation" was declared "applicable in each area of the United States Zone of Occupation," except as repealed or superseded by the Military Government or other competent authority (R. 103). The composition, jurisdiction, and proeedure of the first military government courts in Germany were set forth in Military Government Ordinance No. 2 (R. 100–101). Such courts had jurisdiction "over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law * * *." The courts had jurisdiction, *inter alia,* over:

> (i) All offences against the laws and usages of war.
>
> (ii) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.
>
> (iii) All offences under the laws of the occupied territory or of any part thereof.

Military Government Law No. 2 denied the courts of Germany jurisdiction over "[c]riminal cases involving * * * a dependent accompanying [any person serving with the Armed Forces of any of the United Nations], or [a]ny national of the United Nations * * * " (R. 102).

By Military Government Ordinances Nos. 31, 32, and 33 (14 Fed. Reg. 124–133), effective August 18, 1948, the court system was revised to establish the United States Military Government Courts for Germany upon a district basis with a Court of Appeals for the United States Area of Control (R. 104–105). The criminal jurisdiction of the Military Government Courts was defined in Article 7 of Ordinance 31, as follows:

> *Article 7, jurisdiction of District Courts in criminal cases.* (1) District Courts shall have criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations. No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander in Chief, European Command. No member of an Allied Mission, visiting governmental official, or person subject to the military law of any country other than the United States, shall be brought to trial for any offense except upon authorization of the Military Governor.
>
> (2) District Courts shall have jurisdiction to hear and decide cases involving:
>
> (i) Offenses under legislation issued by or under the authority of the Allied Control Council;
>
> (ii) Offenses under United States Military Government Legislation;

(iii) Offenses under German law in force in the Judicial District of the Court.

On December 11, 1948, by command of General Clay, Commander in Chief of the European Command, United States Army, authorization was given "for trial of any dependent of a member of the United States Armed Forces * * * for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial" (R. 71).[3] Later, a similar authorization was given with respect to civilian employees of the Armed Forces.

The potential jurisdiction of these courts may be measured by the fact that the United States Area of Control has a German population of about 17,000,000, together with a varying number of United Nations nationals including refugees. As of November 30, 1949, there were in Germany approximately 34,000 dependents of members of the United States Armed Forces, plus 4,700 civilian employees with 5,000 dependents. Other United States agencies, such as the State Department, had 4,100 employees in Germany.[3a] The courts have been handling at least 1,000 criminal cases per month including, it is estimated, from 25 to 30 cases involving American civilians.

[3] For a general account of the development of the Military Government courts, see Gen. Lucius D. Clay, *Decision In Germany* (1950), pp. 246-248.

[3a] Both groups of civilian employees presumably include some aliens.

In April 1949, the Governments of the United States, the United Kingdom, and France agreed to the establishment of a provisional, limited German Federal Republic in their zones and to the establishment of an Allied High Commission composed of one High Commissioner of each of the three occupying powers as the supreme agency to exercise control. This plan became effective September 21, 1949, and the supreme authority in the United States Area of Control became the United States High Commissioner appointed by the President. Offices and officials with new titles were established under the Office of the United States High Commissioner for Germany. However, former military government laws remained in effect unless specifically changed, and the courts established under Military Government Ordinance No. 31 became responsible directly to the United States High Commissioner. Courts of the German Federal Republic, as before, were not allowed jurisdiction over members of families of occupation force personnel.[4]

[4] Certain details of the above steps taken in 1949 may be set forth as follows:

By Executive Order of the President 10062, dated June 6, 1949, the position of United States High Commissioner was created. The order provided, *inter alia*, that the Commissioner should be "the supreme United States authority in Germany," and further provided, *inter alia* (R. 58–59):

"* * * The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the govern-

The foregoing organizational structure was in effect on October 20, 1949, when petitioner was arrested by military police. On October 21, 1949,

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mental functions of the United States in Germany (other than the command of troops) * * *.

"3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

"4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements."

The Occupation Statute and the Charter of the Allied High Commission for Germany, which became effective September 21, 1949 (R. 41–53, 108–109), provided, *inter alia*, that the German people should enjoy "self-government to the maximum possible degree consistent with [the] occupation," but reserved powers in various fields, including "Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities" and "Control * * * over the carrying out of sentences" imposed by "courts or tribunals of the occupying Powers or occupation authorities" and over "amnesty, pardon or release," and reserved general authority to the occupying Powers to "re-

she was charged with murder under Section 211 of the German Criminal Code before the United

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sume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments." The Statute also provided that "[l]egislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities * * *." (R. 109–111.)

Under the Charter of the Allied High Commission "all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany" would be "transferred to the three High Commissioners respectively to be exercised in accordance with the provisions [of the Charter] and of the Occupation Statute" (R. 41). Each High Commissioner would be responsible to his Government with respect to his zone for the matters in fields reserved to the occupation authorities, including, *inter alia*, the fields mentioned *supra* and the "administration of justice in cases falling within the jurisdiction of Allied Courts" (R. 50).

On September 21, 1949, by Staff Announcements Nos. 1 and 5, the "Office of the U. S. High Commissioner for Germany" was established, the authority residing in the "U. S. Military Governor" and the "Office of Military Government for Germany (U. S.)" was assumed by the High Commissioner, and it was provided that the courts functioning under Military Government Ordinance No. 31 (see *supra*, p. 5) were to form "an independent judicial unit responsible directly to the United States High Commissioner" (R. 67–69). In the organization chart forming part of Staff Announcement No. 1, the United States Military Government Courts for Germany appeared under the title "U. S. High Commission Courts," and in Staff Announcement No. 5, the courts were referred to as "The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Gov-

States Military Government Court.[5] A summons containing a copy of the charge and particulars was personally served upon her (R. 28).[6] After a preliminary hearing at which petitioner and her counsel were present, petitioner was held for trial (R. 29). She was brought to trial on

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ernment Ordinance No. 31)," although the official change of name was not made effective until January 1, 1950 (R. 67–69, 114).

Somewhat similarly to the earlier Military Government Law No. 2 (see *supra*, p. 4), Allied High Commission Law No. 13, effective January 1, 1950 (15 F. R. 1056), in conjunction with Allied High Commission Law No. 2, September 21. 1949 (14 F. R. 7457), prohibited exercise of jurisdiction by German courts over "members of the families" of members of the occupation forces (R. 111–113).

[5] Section 211 of the German Criminal Code reads as follows in English translation (R. 29):

Murder—Mord

"211. (*As in force prior to 4 September 1941*). Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.

"211. (*As amended 4 September 1941, RGBl I, 549*). The murderer shall be punished by death.

"A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);

"For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives;

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

[6] The agreed statement of facts also recites that a copy of the charges was served on petitioner on November 1, 1949 (R. 30). This copy, including notice of "Rights of the Accused" appears at R. 34–36.

February 20, 1950 (R. 30). In accordance with United States Military Government Ordinance No. 31 (R. 105), the court before which petitioner was tried was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate (R. 30). The court adjudged petitioner guilty as charged and, under the applicable provisions of the German Criminal Code, sentenced petitioner to 15 years of confinement (R. 30–31.) The United States Court of Appeals of the Allied High Commission for Germany affirmed the judgment of the lower court (R. 36–37).[7] After the petitioner was brought back to the United States to serve her sentence, she filed the petition for a writ of habeas corpus involved in this proceeding.

SUMMARY OF ARGUMENT

I

Petitioner, the wife of an Air Force officer stationed in the United States Zone of occupied Germany, contends that only a general court-martial had jurisdiction to try her for murder

[7] The higher court, however, changed the part of the judgment committing petitioner to "The Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct," so that petitioner was committed to the custody of the Attorney General of the United States or his authorized representative. The Director of the Bureau of Prisons then designated the above reformatory as the place of confinement (R. 66).

committed in Germany. In the 1916 revision of the Articles of War, "persons accompanying * * * the armies of the United States without the territorial jurisdiction of the United States" were included by AW 2(d) in the class of "persons subject to military law"; also by Article 92 courts martial were empowered to try "any person subject to military law" for murder committed outside the United States. The result of these amendments was to give courts-martial jurisdiction to try petitioner, as the wife of a soldier in Germany, for murder committed in Germany. However, the 1916 revision of the Articles of War added a new AW 15 providing that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." The Government contends that AW 15 preserved the historic jurisdiction of military government courts to try petitioner for murder committed in occupied Germany.

To sustain her contention in the face of AW 15, petitioner must show that prior to the 1916 revision of the Articles of War military government courts (whether entitled as such or as military commissions or other war courts) would have had no jurisdiction to try a civilian in her

position for the offense with which she was charged. She attempts to do this by alleging that even prior to 1916 a court martial would have had exclusive jurisdiction to try her for murder.

A. To the contrary, it is absolutely clear that since at least 1847 military government courts (often entitled military commissions, provost courts, and provisional courts) have exercised jurisdiction to try American civilians in occupied territory for murder and other civil offenses. Under international law, it is the duty of an occupying power to maintain order in the occupied territory. The decisions of this Court recognize the power of the President, as Commander-in-Chief of the Armed Forces, to discharge this duty by establishing military government courts with criminal jurisdiction over crimes which ordinarily would be tried by the civil courts. The President may establish such tribunals directly or through his military governors and he may staff them with civilian judges. It is undisputed that such tribunals tried American civilians for such crimes as murder committed in occupied territory.

Petitioner must show that at some time prior to 1916 military government courts lost their historic jurisdiction to try her for murder committed in occupied territory. The fact is that prior to 1916 petitioner could not have been tried by a court martial, while she could have been tried by a military government court.

B. AW 15 on its face indicates a Congressional purpose to preserve to military commissions and other war courts the jurisdiction over persons and offenses which they had possessed prior to 1916. The detailed and uncontradicted testimony of General Crowder, the Judge Advocate General, before the Senate and House Committees, makes clear that AW 15, of which he was the principal sponsor, was intended to preserve, *inter alia,* the jurisdiction of military government courts (by whatever name called) to try American civilians accompanying the armed forces abroad for civil crimes committed in occupied territory.

Moreover, prior to 1916, the former AW 63 subjected to military law only civilians falling into the classes of "All retainers to the *camp,* and all persons serving with the armies of the United States *in the field,* though not enlisted soldiers." [Emphasis supplied.] Since such persons were made subject to military discipline only in time of and in the vicinity of hostilities, there was considerable doubt as to whether they were subject to trial by court martial during periods of military occupation characterized by the absence of military operations against an enemy. Since this doubt was one of the factors leading to the revision of AW 2 in 1916, it could have been argued that under the earlier Articles no American civilian in Germany in 1949 was subject to trial by court martial.

At any rate, it seems clear that prior to 1916 only civilians bearing a functional relationship to the army as a fighting force were subject to military law, either as "retainers to the camp" or as "persons serving with the armies of the United States in the field," thus excluding soldiers' dependents even when following the army. This is confirmed by the fact that no case has been found where a soldier's wife or other dependent was tried by an American court martial prior to 1916.

In any event, it is entirely clear that prior to 1916 courts martial *never* had jurisdiction to try *any* civilians for such civil crimes as murder. Until 1863, courts martial lacked jurisdiction to try even soldiers for such crimes. Section 30 of the Enrollment Act of 1863 for the first time empowered courts-martial and military commissions "in time of war, insurrection, or rebellion" to try "persons who are in the military service of the United States" for murder and other enumerated crimes. With the deletion of the reference to military commissions in 1874, this section became and remained AW 58 of the Articles of War up to the 1916 revision. This statute did not, as petitioner contends, empower courts martial to try "persons subject to military law" for such crimes as murder. It did not even empower courts martial to try civilians who were retainers to the camp or serving with the armies in the field for such crimes. Rather, it conferred such juris-

diction only as to "persons in the military service of the United States," a phrase which the Attorney General in 1878, and the Judge Advocate General in 1914, declared to mean, in effect, only officers and enlisted men of the Army. Thus, prior to 1916, *only* military government courts had jurisdiction to try American civilians for murder committed in occupied territory.

C. We believe that it is particularly in accord with American political traditions to provide for the trial of American civilians in Germany a system of courts staffed with civilians and applying a procedure which guarantees every familiar element of due process of law except trial by jury. The British occupation authorities have established similar courts in their area of occupation. Together, the two systems illustrate the Anglo-American tendency to provide civilian courts for the trial of civilians.

D. Since the question involves only the construction of the Articles of War to determine whether Congress has vested in courts martial exclusive jurisdiction to try such American civilians as petitioner for such crimes as murder, we believe that it is decisive of this case that in 1950, Congress, with knowledge that soldiers' wives, such as petitioner, were being tried for civil crimes by the Military Government Courts for Germany, reenacted AW 15 without change as Article 21 of the Uniform Code of Military

Justice. Moreover, for the last two fiscal years, Congress has appropriated funds for "expenses incident to maintaining discipline and order in occupied areas (*including trial and punishment by courts established by or under authority of the President*)." [Italics added.] Clearly, Congress has ratified the construction of AW 15 to provide for the trial by military government courts of American civilians such as petitioner for civil crimes committed in occupied Germany.

II

Petitioner challenges (1) the power of the United States High Commissioner for Germany to establish the tribunal which tried her, (2) the civilian composition of that tribunal, (3) the power and right of the United States to exercise functions of military government in Germany after September 21, 1949 (when she alleges that the military government terminated), (4) her trial and conviction for a violation of the German Criminal Code, and (5) the validity of her trial by any procedure other than the detailed procedure prescribed by the Articles of War.

The first two contentions have been resolved against petitioner by historic American practice as approved by this Court. The third contention has been held to present only a political question. As to the fourth, the application of the German Criminal Code to petitioner was in accordance

with international law and American practice. As to the fifth, petitioner does not even allege a violation of any of the Articles of War which are specifically applicable to military tribunals other than courts martial. To require complete conformity to the Articles, particularly when coupled with petitioner's contention that the court should have been composed of army officers, would completely destroy the war tribunals which AW 15 was enacted to preserve.

ARGUMENT

I

THE PETITIONER, AS THE WIFE OF AN AIR FORCE OFFICER STATIONED IN GERMANY, WAS SUBJECT TO TRIAL BY A MILITARY GOVERNMENT COURT FOR HOMICIDE COMMITTED IN GERMANY

The petitioner contends that, as the wife of an Air Force officer serving with the United States Forces in Germany, she is a person "accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States" and is thus a "person subject to military law" within the meaning of AW 2. From this she concludes not only that she was subject to trial by a general court-martial for the killing of her husband in occupied Germany, but also that the jurisdiction of the general court-martial was exclusive, thereby precluding her trial by a military government court.

We concede that petitioner could have been tried by a general court-martial. However, we

contend that the 1916 amendments to the Articles of War, which subjected petitioner to trial by court martial on a charge of murder, specifically preserved the jurisdiction of a military commission or military government court to try persons in her status for such offense. Thus, we shall show (1) that prior to 1916 petitioner could have been tried for murder only by a military tribunal other than a court martial, (2) that the increased jurisdiction given to courts-martial in 1916 was not exclusive, but concurrent with that previously exercised by such other military tribunals, and (3) that Congress has clearly ratified the construction of the Articles of War under which petitioner was tried by a military government court, rather than by a general court-martial.

A. It Is Well Established That, Absent Any Statute, the President Either Directly or Through His Military Commanders and Military Governors Could Establish Military Government Courts With Jurisdiction To Try Petitioner for Homicide Committed in Occupied Territory

Leaving aside the Articles of War, it is clear that the President had power to establish military government courts in occupied Germany, and to give such courts criminal jurisdiction over both Germans and American civilians. Moreover, he could exercise this power either directly or through his military governors, regardless of whether the latter were soldiers or civilians, and such courts could be composed of either soldiers or civilians.

With the conquest and surrender of Germany in May 1945, and its division into four zones for the purposes of military occupation, the United States assumed the powers and duties of an occupying power with respect to the United States Zone of occupied Germany. Under international law, the occupying power assumes responsibility for the maintenance of law and order in the occupied territory. *The Grapeshot,* 9 Wall. 129.[8]

Article II, Section 2, of the Constitution provides that "The President shall be Commander in Chief of the Army and Navy of the United States * * *." The authority of the President to establish military government in conquered enemy territory in his capacity as Commander in Chief of the Armed Forces has been repeatedly recognized by this Court. In *Cross* v. *Harrison,* 16 How. 164, 190, the Court said:

> Early in 1847 the President, as constitutional commander in chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered territory. * * * No

[8] This principle is recognized in Article 43 of the Hague Regulations as follows:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (36 Stat. 2306).

> one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace.

In *The Grapeshot, supra,* the Court said, at page 132, that the duty of the occupying power to provide a provisional government "was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held." See also, *Mechanics' and Traders' Bank* v. *Union Bank,* 22 Wall. 276; II Halleck, *International Law,* 1893 ed., 444.

The establishment and maintenance of occupation courts is but a part of the authority to establish and maintain military government. In our own history, both the practice and law on this subject have been clear since the Mexican War. General Scott, in an order of February 19, 1847, provided that various offenses, including murder, committed "by any inhabitant of Mexico, sojourner or traveller therein" or "*by any individual of the [United States] forces, retainer or follower of the same*" upon another inhabitant, sojourner, or traveler, or upon "*any other individual of the same forces,*" retainer or follower of the same, should be brought to trial before "military commissions." [Emphasis supplied.] The basis was

stated to be the "unwritten code all armies in hostile countries are forced to adopt," referring to the army's "own safety" as well as to protection of inhabitants against injuries by the army "contrary to the laws of war." Birkhimer, *Military Government and Martial Law* (3d Ed., 1914) App. I, pp. 581–582; Winthrop, *Military Law and Precedents* (2d Ed., reprinted in 1920, pp. 831–833). The commissions were repeatedly convened, mostly in 1847, and included the case of a United States Army captain who was alleged to have murdered another officer. Winthrop, *op. cit.* 832.[9]

In *Leitensdorfer* v. *Webb,* 20 How. 176, 178, this Court took for granted the power of General Kearney, upon the conquest of New Mexico, to establish circuit courts and an appellate court and to confer upon the circuit courts jurisdiction over all criminal cases not otherwise provided for by law and all civil cases not cognizable before the prefects and alcades.

During the Civil War, military tribunals other than courts martial were extensively employed as early as 1861, before the Enrollment Act (*infra,* p. 47), and throughout the war and the ensuing periods of military occupation. Winthrop, *op. cit.* 833. A Provisional Court for Louisiana was established by order of President Lincoln in October

[9] The circumstances of this case are set forth in 5 Ops. A. G. 55.

1862,[10] with a civilian judge and with both civil and criminal jurisdiction. When the civil jurisdiction of the Provisional Court was sustained by this Court in *The Grapeshot*, 9 Wall. 129, 133, it was said that, "We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war." Its criminal jurisdiction was upheld in a murder case by the Provisional Judge in an exhaustive and well-reasoned opinion based upon decisions of this Court. *United States* v. *Reiter*, 27 Fed. Cas. No. 16146. A military governor's appointment of a civilian as judge was treated as valid in *Handlin* v. *Wickliffe*, 12 Wall. 173, 174–175.

In *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 297, the commanding general of the forces occupying New Orleans had established a provost court. It was contended in this Court that he "had no authority to establish such a court;" that the President alone, as commander in chief, had such authority. Rejecting this contention, the Court stated:

> * * * General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except

[10] The text of this order is set forth in *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 279.

> so far as they were denied to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of the war, were the acts of his commander in chief.

The various Mexican and civil war military commissions tried over 2,000 cases, including the cases of 100 women. Winthrop *op. cit.* pp. 834, 838. The same principles were applied to uphold the military commissions or military government courts established in Cuba and Porto Rico during and following the war with Spain. *Ex parte Ortiz,* 100 Fed. 955 (C. C. D. Minn.), upheld the conviction by a military commission of a native of Porto Rico charged with the murder of an American soldier. In *Santiago* v. *Nogueras,* 214 U. S. 260, this Court found power in the President as Commander in Chief to establish a Provisional Court or military government court in Cuba even after ratification of the treaty of peace which ceded Porto Rico to the United States. See also *Neely* v. *Henkel,* 180 U. S. 109, discussed *infra,* p. 45.

The jurisdiction of military commissions has been summarized in the Digest of Opinions of the Judge Advocate General of the Army (1912), pp. 1066–1067, as follows:

> By a practice dating from 1847 and renewed and firmly established during the

Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. * * *

* * * Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which martial law has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district.

In brief, by 1916 it was settled that under the conditions of a military occupation the President, either directly or through his military governors, or his military governors presumed to be acting on his behalf, could establish military government courts in occupied territory, vest both civil and criminal jurisdiction in such courts, and appoint either military men or civilians to act as judges. The criminal jurisdiction of military government courts included civil crimes, whether committed by inhabitants of the occupied territory, American civilians or (until 1863, see *infra* p. 46) soldiers of the occupying forces. This jurisdiction of military tribunals other than courts martial was, of course, in addition to their jurisdiction over violations of the laws of war recognized in *Ex parte Quirin*, 317 U. S. 1, and *In re Yamashita*, 327 U. S. 1, and the jurisdiction expressly conferred upon them by such statutes as AW 80–83.

Thus, the petitioner was clearly subject to trial by a military government court in Germany for murder committed in Germany, unless Congress has vested general courts-martial with exclusive jurisdiction over persons in petitioner's status or over the offense with which she was charged.

B. The 1916 Revision of the Articles of War Expressly Preserved in AW 15 the Jurisdiction of Military Government Courts to Try Petitioner for Murder, Although Conferring Upon Courts-Martial a Concurrent Jurisdiction, Which They Theretofore Lacked, to Try Her for That Offense

The petitioner's principal contention is that a general court-martial possessed exclusive juris-

diction to try her for murder. To sustain this contention, she must show, as she attempts to do, that prior to 1916 a military government court or military commission would have lacked jurisdiction to try her for murder committed in occupied territory and, therefore, that no such jurisdiction was preserved to such war courts by AW 15. To the contrary, it is clear that prior to 1916 a court martial had no jurisdiction to try petitioner or any other civilian on a charge of murder, that a military government court or military commission possessed and exercised such jurisdiction, and that AW 15 preserves and was intended to preserve the latter jurisdiction concurrent with the jurisdiction over such persons and offenses which, in 1916, was for the first time conferred upon courts martial.

The Articles of War before and after 1916. Prior to the 1916 revision of the Articles of War, AW 63 subjected to the jurisdiction of courts martial the following civilians: "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers." Winthrop, *op. cit.* p. 991.[11] In 1916, AW 12 gave courts martial jurisdiction over "any person subject to military law", a phrase which was defined in AW 2 (d) to include "All retainers to the camp and *all persons accompanying* or serving with the armies of the

[11] The appendix to Winthrop's *Military Law and Precedents* contains the texts of the various Articles of War to and including the revision of 1874.

United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles:". [Italics added.] As we will point out later, this resulted in a substantial broadening of the class of civilians subject to court martial jurisdiction.

Also, prior to 1916, the former AW 58 empowered general courts martial "in time of war, insurrection, or rebellion," to try "persons in the military service of the United States" for such serious civil crimes as murder, robbery, and arson. Under the 1916 revision, AW 92 and 93 subjected "any person subject to military law" to trial by general court martial for murder and rape committed outside the United States and for such other crimes as robbery, arson, assault and larceny wherever committed. Thus, the 1916 revision of the Articles of War not only increased substantially the class of civilians triable by courts martial, but it also greatly increased the class of offenses for which such civilians could be tried by courts-martial.

It would appear that the petitioner was "accompanying" the armies of the United States in Germany and was therefore a "person subject to military law" who, since 1916, could have been tried by a general court-martial for murder com-

mitted in Germany. However, while the 1916 revision was substantially broadening the jurisdiction of courts martial over persons and offenses, it also added AW 15 providing that:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

It will be noted that the concurrent jurisdiction which is preserved for military tribunals other than courts martial relates to both the *offenders* and the *offenses* "that [by statute or] by the law of war may be lawfully triable by such" other tribunals. Leaving aside the limited statutory[12] jurisdiction of such military tribunals, we must determine whether prior to 1916 courts martial had acquired exclusive jurisdiction over civilians in the status of the petitioner, at least when charged with murder. For, if prior to 1916 she was subject to trial on a charge of murder by a military government court, the jurisdiction of the latter tribunal was preserved by AW 15.

This Court has already held that AW 15 effectively preserved the jurisdiction of a military commission to try offenses against the law of

[12] The words "by statute or" were added in 1920.

war. *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* 327 U. S. 1, although offenders against the law of war have been triable also by court martial since 1916, by reason of AW 12. It has been shown above that military tribunals other than courts martial (i. e., military commissions, military government courts) also had jurisdiction over *civil crimes which would normally be tried by the civil courts* and over breaches of military regulations, and over *all persons* in occupied territory. (*Supra,* pp. 24–25). We will now show that AW 15 preserved this jurisdiction of military tribunals other than courts martial. Moreover, we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilian for murder or any of the other serious civil crimes enumerated in Article 58 of the pre-1916 Articles of War.

1. *AW 15 preserves to military government courts a jurisdiction concurrent with that of courts martial to try American civilians for civil crimes committed in occupied territory.* We believe that AW 15 on its face states a clear purpose to preserve to military tribunals other than courts martial the jurisdiction which they had exercised over persons and offenses prior to 1916.

This is confirmed by the legislative history of the 1916 revision of the Articles of War. That history consists of reports of the Senate Committee on Military Affairs in 1914 and 1916; S. Rept. 229, 63rd Cong., 2d Sess.; S. Rept. 130, 64th Cong., 1st Sess. There is attached to each report an appendix containing the testimony of General Crowder, the Judge Advocate General, before Senate and House Committees. This Court has recognized the authoritative character of his testimony, particularly in relation to Article 15 which he sponsored. *In re Yamashita*, 327 U. S. 1, 19, 67-71. Accordingly, and because we believe that General Crowder's explanations are conclusive on the core of this case, we set forth at length relevant passages of his testimony.

1. From S. Rept. 229, 63rd Cong., 2d Sess.:

* * * * *

> The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the

Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will *overlap* that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent. [Italics supplied.] [p. 53]

* * * * *

Mr. SWEET. There is more elasticity, I suppose?

Gen. CROWDER. Yes, sir; and the lack of statutory recognition has not prevented the Supreme Court from supporting the jurisdiction of the military commission in the trial of the gravest cases, and supporting it in the most explicit language. It is a most important institution in time of war. [p. 59.]

* * * * *

Gen. CROWDER. That is a legitimate criticism of the article and one which I had considered before proposing article 92. I was influenced to propose the article largely, perhaps, by experience during our second intervention in Cuba. It was not very long after that intervention had been inaugurated until two soldiers were charged with homicide of some natives. There was no civil court of the United States having jurisdiction. Plainly the court-martial could not try them, as the condition was not war. There were two courses open. First, to surrender them for trial before a Cuban court, which administered a jurisprudence in all respects alien, with whose procedure they were unfamiliar, and which was conducted in a language not understood by the accused soldiers; the second course was to utilize the extraordinary authority which inhered in the office of the provisional governor and which extended to the making of laws, to promulgate a special decree creating a provisional court for the trial of these men. This second course was followed, and the accused soldiers were tried by a court composed of officers of the Army, which administered the provisions of the Spanish criminal code. Should we be confronted again with the necessity of intervention, that situation is likely to repeat itself. I have been determined to avail myself of the first opportunity to pass up my share of re-

sponsibility for the continuance of these conditions to higher authority [pp. 98–99].

* * * * *

2. From S. Rept. 130, 64th Cong., 1st Sess.:

* * * * *

We now come to subhead [AW 2] (d), and here there is a change in the law which will claim your attention. In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.), and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included.[13] They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army [p. 37].

[13] By this General Crowder means that such persons could not have been tried by court martial prior to 1916. However, as we have shown, they could have been tried by military commission.

Article 15 is new. We have included in article 2 as subject to military law a number of persons who are *also* subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced [italics supplied]:

> Art. 15. *Not exclusive.*—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. For the information

of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents:

> The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (*Ex parte Vallandigham,* 1 Wall., 243, and *Coleman* v. *Tennessee,* 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. It's composition, constitution, and procedure follows the analogy of courts-

martial. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.

Yet, as I have said, these war courts never have been formally authorized by statute.

Senator COLT. They grew out of usage and necessity?

Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.

Senator COLT. Yes [pp. 40–41].

General Crowder's testimony reflects in detail the jurisdiction exercised by military tribunals other than courts martial prior to 1916, and the restrictions upon court martial jurisdiction both as to persons and as to offenses. Thus, he defined the pre-1916 court martial jurisdiction over civilian in terms of "retainers to the camp" and "persons serving with the armies in the field", and he illustrated these categories by examples of persons whose activities bore a functional relationship to troops. He made it clear that by including in the new concept of "persons subject to military law" persons "accompanying" the

armies, it was sought to bring within the jurisdiction of courts martial all persons who "accompany" the army regardless of their function and purpose in doing so. Thus, soldiers' dependents accompanying the army outside the civil jurisdiction of the United States, and who were also subject to trial by military government courts, were in 1916 made subject to trial by court martial for the first time.

Also, General Crowder recognized that under the pre-1916 articles "retainers to the *camp*" and civilians "serving with the armies *in the field*" were "made subject to the Articles of War only during the period and pendency of war and while in the theatre of military operations." Then, he pointed out that as a consequence courts martial lost jurisdiction in the areas occupied as a result of the Spanish war as soon as peace was restored between Spain and the United States, and that courts martial never acquired jurisdiction over such civilians during the 1906 intervention in Cuba because of the absence of hostilities. This may well mean, as we will suggest later, *infra*, pp. 40–45, that prior to 1916 even those civilians in a functional relationship with the army could be tried by courts martial only in time of and in the vicinity of actual hostilities or combat operations. If this is correct, it means that under the pre-1916 Articles of War courts martial had no jurisdiction over such civilians in occupied territory once actual hostilities had ceased, and

that only the nonstatutory war courts would have had such jurisdiction, as in Cuba in 1906.

As to jurisdiction over offenses, General Crowder pointed out three times that military commissions or war courts had jurisdiction in occupied territory to try civil crimes which would ordinarily be tried by the civil courts, e. g., murder.

General Crowder advised both the Senate and House Committees that the introduction in AW 2 (d) of the phrase "persons subject to military law" would "subject to military law a number of persons who are *also* subject to trial by military commission. * * * As long as the articles embraced them in the designation 'persons subject to military law', and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article [AW 15] was introduced." And again, testifying before the House Committee as to the purpose of AW 15: "There will be more instances in the future than in the past when the jurisdiction of courts-martial will *overlap* that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article [AW 15] that in such cases the jurisdiction of the war court is concurrent." (Italics supplied.)

General Crowder's definition of the existing jurisdiction of the war tribunals which was to be preserved by AW 15 completely refutes the petitioner's apparent contention (Pet, 35–50) that, apart from jurisdiction specially conferred by statute, AW 15 preserved to military commissions and other war tribunals only jurisdiction over offenses against the "laws of war." On its face, AW 15 defines the concurrent jurisdiction in terms of "offenders or offenses that * * * by the law of war may be triable by such military commissions, provost courts, or other tribunals." By the "law of war" is clearly meant that part of the law of nations which defines the powers and duties of belligerent powers, and particularly an occupying power. This is evidenced by General Crowder's inclusion in the jurisdiction of war courts of those civil crimes which the civil courts would try in ordinary circumstances, and which the occupying power is obligated to suppress. As was said in *In re Yamashita, supra,* at p. 20, with reference to AW 15: "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin,* to any use of the military commission contemplated by the common law of war."

2. *Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were without*

jurisdiction over soldiers' dependents bearing no functional relationship to the army as a fighting force. From the Revolution until 1916, military law and jurisdiction were limited to soldiers, plus those civilians whose relationship to soldiers in periods of military activity was so close that of necessity they were subjected to military control. Thus, Article 32 [14] of the American Articles of War of 1775 provided that "All suttlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." Winthrop, *op. cit.* 956. In the Articles of War of 1806, this limited jurisdiction over civilians appears as Article 60, as follows (Winthrop, *op. cit.* 981): "All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." This provision remained unchanged as AW 63 until 1916, except that in the 1874 revision the words "suttlers or" and "whatsoever" were eliminated. The phrase "subject to orders, according to the rules and discipline of war" was ap-

[14] This was taken practically verbatim from Article XXIII of Section XIV of the British Articles of War of 1765, in force at the beginning of the Revolution, as was Article 31 of the Massachusetts Articles of War of 1775. Winthrop, *op. cit.*, pp. 941, 956.

parently construed to subject such persons to trial by court martial. Digest Ops. J. A. G. 1912, p. 152.

The necessity for extending military jurisdiction to such civilians arose from the fact that in earlier days they were performing for the army certain essential functions which today are carried on by uniformed personnel. Thus, sutlers carried on the function of the present day post exchanges; civilian contractors handled much of the army's supply and transport; and the medical services relied heavily upon civilian surgeons under contract. Thus, Winthrop, *op. cit.* 98–99, includes under retainers to the camp "camp followers attending the army but not in the public service * * * sutlers, sutlers' employees, newspaper correspondents, telegraph operators, and some others"; and he defines "persons serving with the armies in the field" in terms of "civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts, and spies, and men employed on transports and military railroads and as telegraph operators, etc." The functional relationship of this latter group to the Army is obvious.

Also, it should be noted that jurisdiction over civilians was limited as to *time* and *place* by the use of the words "retainers to the *camp*" and "persons * * * serving with the armies

* * * *in the* field." Winthrop concluded that the use of these terms "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of war," citing Attorney General William's view (14 Ops. A. G. 22, 23) that the words " 'in the field' * * * imply military operations with a view to an enemy." Winthrop also concluded that "Upon a declaration of peace, or other legal termination of hostilities, the Article is no longer operative." Winthrop, *op. cit.* 101–102. See also 16 Ops. A. G. 13, 15. Similarly, the view of the Judge Advocate General was summarized as that "This article [AW 63] has been applied principally to civilians serving in a quasi-military capacity in connection with troops in time of war and in the theatre of war." Digest Ops. J. A. G. 1912, p. 151. In any event, it is clear that the pre-1916 jurisdiction over civilians "serving with the armies * * * in the field" was restricted to those civilians bearing a functional relationship to the army as a fighting force when faced with an enemy. This limitation of the former AW 63 jurisdiction in terms of function, time and circumstance left it very doubtful whether it extended (1) to American civilians performing governmental functions in occupied territory unrelated to the maintenance of the army as a fighting force, and (2) to the period of military occupation after the cessation of hostilities. As

we have seen one of the principal purposes of the 1916 revision of the Articles of War was to extend court martial jurisdiction to civilians performing such functions under such circumstances.

Petitioners contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 is inconsistent with the terms and construction of that article, and is based upon dubious authority. Petitioner cites (Pet. pp. 19, 21, 23) the military writers Ives, Hough, Simmons and Winthrop for the proposition that the families of soldiers are "retainers to the camp" or "serving with the armies". We can find no such assertion in Ives, *A Treatise on Military Law,* or in Simmons on *Courts Martial.* In Hough, *Precedents in Military Law,* pp. 401–402, 629, there are cited two cases of the trial by "court martial" of two British soldiers' wives in India in 1824 and 1825. Winthrop merely cites Hough and Simmons.[15] There is no indication of the circumstances under which these trials occurred or, indeed as to whether a distinction was made between courts martial and other military tribunals. In any event, the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court martial

[15] See 4 Geo. IV, ch. 81, for a special Mutiny Act applicable to India.

jurisdiction then or later.[16] Neither the petitioner nor the respondent has found any case of a wife or other dependent of a soldier who was tried by an American court martial prior to the revision of the Articles of War in 1916.

On the other hand, it is perfectly clear that the wife and other dependents of a soldier were, like any other civilians or the soldier himself, subject to trial by military commissions or military government courts for civil crimes which could not be tried by the ordinary civil courts for the area in which such crimes were committed. Just as General Scott arranged the trial of an army officer for murder before a military commission, and just as Neely of *Neely* v. *Henkel, infra,* was extradited to Cuba to be tried under Cuban law by a Cuban court created by the American military governor, so the petitioner could have been tried before a military government court for murder committed in occupied territory.

3. *Prior to 1916, courts martial lacked jurisdiction to try any civilian for murder.* Petitioner con-

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[16] While Article 63 had its practically verbatim origin in Article XXIII of Section XIV of the British Articles of War of 1765 (Winthrop, *op. cit.*, p. 941), it would be fallacious to presume from alleged Indian precedents that English military law has developed in the direction of subjecting soldiers' dependents to the jurisdiction of courts martial. For, as pointed out at pp. 55–56 of this brief, British military government courts in Germany, rather than courts martial, have jurisdiction over British civilians, including soldiers' dependents, in the British zone of Germany.

tends that prior to 1916 a court martial had exclusive jurisdiction to try a civilian in her circumstances on a charge of murder (Pet. 36–51). From this she concludes that a military government court would have possessed no jurisdiction to be preserved by AW 15. To the contrary, it is absolutely clear that prior to the 1916 revision of the Articles of War courts martial had no jurisdiction, concurrent or exclusive, to try any civilian on a charge of murder.

Until 1863, courts martial lacked jurisdiction over such capital offenses as murder, as distinguished from the military offenses defined in the Articles of War up to that time.[17] By this we mean that the Articles of War prior to that date did not even empower courts martial to try soldiers for such crimes, to say nothing of civilians. Until 1863, the Articles of War dealt with capital crimes committed by soldiers by providing for the surrender of soldiers accused of such crimes to the civil courts. See AW 33 of the

[17] We need not now consider the extent to which courts martial obtained jurisdiction over noncapital civil crimes through Article 99, which provided that (Winthrop, *op. cit.* 985)—

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion."

For Article 99 was limited by its terms to officers and soldiers.

Articles of War of 1806, Winthrop, *op. cit.* p. 979.

It was only in 1863, as a part of the Enrollment Act (conscription act) that Congress, for the first time, gave jurisdiction to courts martial to try soldiers for serious civilian crimes, as follows (Section 30 of the Act of March 3, 1863, 12 Stat. 731, 736):

> SEC. 30. *And be it further enacted,* That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, *when committed by persons who are in the military service of the United States,* and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed. [*Italics supplied.*]

It will be noted that the 1863 statute conferred jurisdiction over such crimes upon both general courts-martial and military commissions. In the 1874 revision the words or "military commission" were omitted. At one point, Winthrop *op. cit.* 833, n. 71, refers to this omission as "apparently inadvertent," and at another point as "proper for the

reason that a military commission is not the appropriate tribunal for the trial of *military* persons.'" Winthrop *op. cit.* 667.

Regardless of the reason for the 1874 omission, Winthrop was clearly correct in referring to the 1863 grant of jurisdiction in terms of "military persons." Section 30 of the 1863 statute conferred jurisdiction over such crimes as murder only "when committed by persons who are in the military service of the United States", a limitation which was embodied in AW 58 of the 1874 Articles of War and continued in effect until the 1916 revision. Petitioner repeatedly refers to the jurisdiction conferred by the 1863 Act as applying to "persons subject to military law" (Pet. 43, 44, 46). This is a serious misstatement. From 1863 to 1916 the jurisdiction of a court martial over such crimes as murder was limited to "persons in the military service of the United States." The subsequent phrase "*and* subject to the Articles of War" does not enlarge the class covered. In 1878, the Attorney General ruled, with reference to AW 60 (prohibiting frauds against the United States) of the 1874 Articles of War, that "the words 'in the military service,' there used, are not to be taken in so general a sense as to include all who are employed in connection with that service in any capacity whatever. They must be construed with the provision by which the Articles are preceded, and which declares that the latter shall govern 'the armies

of the United States.'" Upon this reasoning, the Attorney General held that civilian clerks employed by quartermasters were not amenable to the jurisidiction of a court martial. 16 Ops. A. G. 13, 16. Thus, we find General Crowder explaining that AW 60 (which became AW 94 in the 1916 Articles) was changed to apply to "any person subject to military law" rather than to any person in the military service of the United States. The significance of the change was brought out as follows:

> Mr. KAHN. Why do you prefer the new language to the old?
>
> Gen. CROWDER. Because the phrase "any person in the military service" does not include all persons subject to military law. We have these numerous retainers to the camps and contractors serving with the Army in the field who can commit fraud.

Sen. Rep. 229, 63d Cong., 2d sess., p. 104. This construction of the identical language in AW 60 is obviously applicable to AW 58 as well.

Thus, it is entirely clear that prior to 1916 neither petitioner nor any other civilian could have been tried for murder by a general court martial. Indeed, this result is confirmed by the legislative history of Section 30 of the 1863 statuate. While Section 30 was bitterly attacked, even its opponents expressly assumed that it was limited to soldiers. 62 Cong. Globe 1256, 1377, 1384. The grudging nature of this grant of un-

paralleled jurisdiction to courts martial is indicated by the fact that as reported in the Senate Section 30 would have given exclusive jurisdiction over murder and other crimes to courts martial. When it was pointed out (62 Cong. Globe 988) that "The bill as it now stands would give exclusive jurisdiction of certain crimes to the military tribunals and take them away from civil tribunals," it was amended to omit the provision for exclusive jurisdiction.

Since AW 58 of the 1874 Articles of War, as derived from Section 30 of the Enrollment Act of 1863, did not authorize courts martial to try civilians for murder and the other enumerated civil crimes, it is unnecessary to deal with the petitioner's further contention that the jurisdiction of courts martial under AW 58 was exclusive. Of course, as this Court held in *Coleman* v. *Tennessee*, 97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, the "officers and soldiers" of an invading or occupying army are not subject to the laws and courts of the invaded or occupied country. As petitioner admits, the jurisdiction conferred upon courts martial by the 1863 statute was not exclusive so as to deprive the civil courts of the United States of jurisdiction to try even soldiers for civil crimes such as murder. *Caldwell* v. *Parker*, 252 U. S. 376.[18] Moreover, even

[18] The statement in *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y., 1917), relied upon by petitioner (Pet. 27–28), that a court martial has "exclusive jurisdiction" to try a civilian mate on a military transport for violation of a military order,

if civilians were triable for such crimes by courts martial, it by no means follows that they may not also be subjected to trial by courts established by the occupying power in occupied territory in the discharge of its duty to maintain order. The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents,[19] who bear no functional relationship to the occupying troops. Whether courts martial should exercise exclusive jurisdiction over such persons would seem to involve a question of governmental policy rather than of individual right. At any rate, this seemed to be the view of Congress in enacting the Act of June 6, 1900, 31 Stat. 656, for the express purpose of providing for the extradition of Neely and other military govern-

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is correct in that no civil court would have jurisdiction over that offense. The opinions of the Judge Advocate General cited by petitioner (Pet. 38–39) for the alleged exclusive jurisdiction of a court martial, all involved soldiers.

[19] The doctrine of *The Exchange*, 7 Cranch 116, 139, that foreign troops in friendly passage through another country are not subject to the jurisdiction of the local courts, has not been construed to preclude subjecting soldiers' dependents to trial by the local courts. See, e. g., the agreement of March 2, 1943, between the United States and Egypt respecting jurisdiction over crimes committed by American armed forces in Egypt, which specifically provides that "the wives and children of the members of the United States Forces * * * will be amenable to the jurisdiction of Egyptian courts" (57 Stat. 1197).

ment employees to Cuba to be tried for violation of "the criminal laws in force therein" by a Cuban court, where such law and courts were created by the American military governor. *Neely* v. *Henkel,* 180 U. S. 109; 33 Cong. Rec. 5912–5923, 6452–6461. In this view, military government courts are simply a substitute for the concurrent jurisdiction which civil courts would normally exercise.

To summarize, it is clear that prior to 1916 courts martial would have had no jurisdiction to try petitioner or any other civilian for murder committed in occupied territory or elsewhere. In other words, until 1916, *only* a military government court or military commission could have tried petitioner for murder committed in occupied territory. AW 15 preserved that jurisdiction concurrently with the jurisdiction which was conferred upon courts martial for the first time in 1916.

C. The Articles of War Should be Construed to Permit the Trial of American Civilians in Occupied Territory by Civilian-Type Tribunals Rather Than by Courts Martial

It has been a fundamental of our society that civilians should be tried on criminal charges by military courts only in extraordinary circumstances. *Ex parte Milligan,* 4 Wall. 2. Consistent with that policy, the United States established in the United States Zone of Germany a system of military government courts, staffed with civilian judges trained in civilian law, and

with procedures which accord every major element of our customary procedural due process except indictment and trial by jury. Since it is much more appropriate for these courts rather than courts martial to try American civilians, there is no reason to strain the interpretation of the Articles of War to reach any other result.

Without in any way disparaging the courts martial system as prescribed by the Articles of War, we may nevertheless mention important distinguishing characteristics of the military government courts. The latter are composed entirely of experienced civilian lawyers,[20] while ordinarily only the law member of a general court martial is a lawyer. Courts martial are largely *ad hoc* tribunals in that, if not constituted to try a single or a few cases, the membership is frequently changed. The military government courts, which exercise not only a criminal jurisdiction over groups of civilians in addition to soldiers' depend-

[20] Judges and Magistrates and the District Attorneys and their assistants were required to be "graduates in law and members in good standing of the Bar of one of the States of the United States or of the District of Columbia, and must have been engaged in active legal work (as attorney at law, as Judge of a Court of Record, or as a teacher of law at a law school approved by the American Bar Association) for at least: (i) Ten years in the cases of the Chief Judge and Associate Judges of the Court of Appeals * * *; (ii) Five years in the cases of the District Judges * * *; (iii) Three years in the cases of Magistrates and District Attorneys * * *," subject to waiver of such qualifications by the Military Governor upon written recommendation of his his Legal Adviser (Military Government Ordinance No. 31, Art. 14 (1); 14 F. R. 127).

ents but also a broad jurisdiction over civil cases, have an opportunity for acquiring an expertness which is denied to non-lawyer army officers who occasionally serve on courts martial.

A political objective of the military occupation is to encourage a rebirth of democracy in Germany. Nowhere is the impact of the occupation more delicate than in the administration of justice, since German civilians are tried in these same military government courts for offenses against Allied nationals and violations of military government ordinances. We believe that it is setting a sound example to provide in occupied Germany for the trial of American civilians by courts which, while deriving their authority from the military fact of occupation, are civilian in their composition and procedure. The example is even more impressive when American and German civilians alike are tried by the same courts and by the same procedure.

We believe that it is significant that the United Kingdom, confronted with the same problems of administering justice, has established a similar system of military government courts, known as control commission courts. The British Army Act (22 Halsbury's Statutes of England, 2d ed. pp. 255, *et seq.*), like our Articles of War, applies to "persons subject to military law". Section 176 (10) includes in that class "All persons not otherwise subject to military law who are followers of or accompany His Majesty's

troops, or any portion thereof, when employed on active service.'" Section 189 provides that "the expression 'on active service' as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, *or is in military occupation of any foreign country.*" [Emphasis supplied.] The United Kingdom has not interpreted these provisions of the Army Act as precluding the establishment in the British Zone of Germany of civilian-type courts for the trial of British civilians. British Ordinance No. 68, 17 Military Government Gazette (British Zone of Control) 437; 26 *ibid.* 921; 16 Official Gazette of the Allied High Commission for Germany 179. These courts, designated Control Commission Courts "have jurisdiction over all persons in the British Zone, except persons *other* than civilians, who are subject to Military, Naval or Air Force Law, and are serving under the command of the commander of any forces of the United Nations in the Federal Republic of Germany." Article II. Like the United States Military government courts, these British courts consist of trial courts and an appellate court staffed with experienced lawyers, and exercise criminal jurisdiction. It is interesting to note that under this ordinance British subjects are

entitled to be tried by a jury consisting of seven British subjects on criminal charges for which the maximum penalty is death or a sentence of imprisonment exceeding five years. At any rate, it is significant that the United Kingdom, which, like ourselves, has carefully limited the jurisdiction of courts martial over civilians, has also found it desirable to provide civilian courts and procedures for the trial of British civilians accompanying the British occupation forces in Germany.

Petitioner does not even contend that the procedure by which she was tried deprived her of any element of due process of law as we know it. That procedure was prescribed by Military Government Ordinance No. 32, entitled Code of Criminal Procedure for United States Military Government Courts for Germany, 14 F. R. 128–132. Ordinance No. 32 provides for a preliminary hearing on criminal charges (Articles II and III), for "charges" containing "a plain and concise statement of the facts alleged to constitute the offense and the place and time thereof in order that the accused may have the information reasonably necessary to enable him to prepare his defense"; he is entitled to the assistance of counsel and in cases other than those before a Magistrate, i. e., serious crimes, he must be provided with counsel if he is unable to obtain counsel himself (Article IV); he is entitled to present

evidence on his own behalf and to cross-examine the prosecution witnesses (Article V). "The admissibility of evidence shall be in accord with the Rules of Evidence generally recognized in the trial of criminal cases in the United States. The most important of these Rules are summarized in Chapter 25 of the Manual for Courts Martial, U. S. Army" (Article VI (1)). The privilege against self-incrimination is specifically recognized (Article VI (3) (4)), as are the privileged communications of husband-wife, parent-child, attorney-client, and priest-penitent (Article VII (4)). Duly authenticated depositions taken upon notice may be received in evidence in non-capital cases (Article VI (6)). The military government courts are empowered to administer oaths, subpoena witnesses and admit to bail. Special procedures are provided for dealing with the issue of insanity and juvenile offenders. (Article VIII (7) (8).) The defendant may appeal both on "questions of law and of fact except that, in dealing with questions of fact, the Court shall set aside or reverse the decision of the District Court in criminal cases only if the evidence does not support a finding of guilt beyond a reasonable doubt." Ordinance No. 31, Article 12 (14 F. R. 127). The opinions of the Court of Appeals are regularly published in English and German for the guidance of the lower courts.

D. Congress, With Knowledge That AW 15 has Been Interpreted to Permit the Trial of Soldiers' Dependents in Occupied Territory by Military Government Courts, Rather Than by Courts Martial, Has Ratified That Interpretation by Re-enacting AW 15 Without Change in 1950, and by Appropriating Funds to Maintain Such Courts.

The establishment of the United States Military Government Courts for Germany with criminal jurisdiction over all American civilians in the American Zone of Germany has been no secret. Military Government Ordinances 31, 32 and 33, which established the courts and prescribed their composition, jurisdiction and procedure, were published in the Federal Register on January 11, 1949 (14 F. R. 124–133). The trial of Mrs. Ybarbo before such a court was given wide publicity in this country.

In any event, when Congress was considering what became the Uniform Code of Military Justice (Act of May 5, 1950, 50 U. S. C., Supp. IV, 581), both the Senate and House Committees on Armed Services were specifically advised of the establishment in occupied territory of military government courts exercising criminal jurisdiction over American civilians. In the *Hearings before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., on the Uniform Code of Military Justice,* the following is significant (p. 876):

> Mr. Elston. That this wife of the soldier who recently was tried. I forget the name.
>
> Mr. Larkin. Mrs. Ybarbo.

Mr. ELSTON. Yes. She was tried for murder and was given a life sentence and it was reduced to 5 years because the law of Germany requires 5 years as maximum punishment.

Mr. LARKIN. Yes.

Mr. ELSTON. She was not tried by court martial.

Mr. LARKIN. No.

Mr. ELSTON. By a military court. She was tried by one of those special courts that had been set up in Germany.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. Now do you think there is any possibility of this section being construed as divesting those courts of jurisdiction over families of soldiers?

Mr. LARKIN. No. It could not specifically because we have in another part of the code an article which specifically guards their jurisdiction.

Mr. SMART. They have concurrent jurisdiction, Mr. Elston.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. If you say it is mentioned later on, we do not need to bother with it now.

Mr. LARKIN. Yes. So this could not be construed as divesting any occupation court, military tribunal, or provost court of any jurisdiction that it currently has today.

Mr. BROOKS. I just received today a letter from a mother saying she was going to visit her daughter who is the wife of

an officer in Germany. When she arrives over there the court, that is the military court, would have concurrent jurisdiction under this code with the court martial in the trial of the case if one should arise, would they not?

Mr. LARKIN. The occupation court would have jurisdiction over her if she committed any crimes.

Mr. SMART. I do not see where that particular person would come under the code. She is not serving with, employed by, or accompanying the forces.

Mr. LARKIN. That is right.

Mr. SMART. She would not, in any case, in my opinion, be subject to this code. Whereas the family of the soldier, be it officer or private, does accompany him and he certainly is a part of the forces.

I do not think it could be construed that this provision would ~~be broad~~ enough to cover the relative who goes for a mere visit.

And further, at p. 975:

Mr. BROOKS. Now, let us proceed with article 21.

Mr. SMART (reading):

ART. 21. Jurisdiction of courts martial not exclusive.

The provisions of this Code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders

or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

References: A. W. 15; proposed A. G. N., article 5 (f).

Commentary: The language of A. W. 15 has been preserved because it has been construed by the Supreme Court. (See *Ex Parte Quirin*, 317 U. S. 1 (1942).)

Mr. ELSTON. Mr. Chairman, might we have some explanation for the record of what is meant by "military commission, provost courts, or other military tribunals"?

Mr. BROOKS. You want to undertake that, Mr. Larkin?

Mr. LARKIN. Well, which part of it concerns you, Mr. Elston? Is it the "other military tribunals"?

Mr. ELSTON. No. I think for the record there ought to be an explanation of all that. "Such military commissions"—someone on the floor may want to know what a military commission is.

Mr. LARKIN. I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war.

Mr. ELSTON. Appointed by the President?

Mr. LARKIN. By the President. You have an example in that Sabateur case. That was a military commission.

A provost court is—what, Colonel Dinsmore? Is that a military government court or is it——

Colonel DINSMORE. It is an occupation court.

Mr. LARKIN. It is an occupation court; a court that may be set up by the occupation authorities within the area that they occupy.

There are other military tribunals. Are they occupation courts, too? What other kinds are there?

Colonel DINSMORE. Courts of inquiry.

Mr. ELSTON. Well, a court of inquiry does not have power to impose punishment, does it?

Mr. LARKIN. No. We have a provision in article 136 here for courts of inquiry, which cannot impose punishment or make a finding of guilty or not guilty.

Colonel DINSMORE. I suppose a Military government court is a military tribunal.

Mr. LARKIN. And that is a court that is similar, then, to the provost court; is that right?

Colonel DINSMORE. Yes; with greater jurisdiction.

And at p. 1061:

Mr. BROOKS. I would like to ask one question. It is going back, and I think it has been covered, but I did not fully understand it. Exactly what is the definition of a provost court?

Mr. LARKIN. Well, I suppose the name itself is derived from the Provost Mar-

shal's Department, which is generally the Department that controls the military police.

Mr. BROOKS. How does that differ from a court martial?

Mr. LARKIN. Well, a provost court, like other military commissions and tribunals which are usually used in occupied territories and which are the creatures of the occupying authority, is operated in accordance with whatever rules are prescribed for them. Many of the military or provost courts, for instance, that operate in occupied territories will follow, to a large extent, the court-martial procedures, but they may specifically apply the local law.

In many recent cases in occupied territory they have followed the procedures of court martial, but specifically they applied the German law. They are ad hoc special courts for a special purpose.

Mr. BROOKS. Are they not intended to cover the civilians?

Mr. LARKIN. Civilians who are not subject to the code.

Mr. BROOKS. Civilians who are not subject to the code. Is that right, Colonel?

Colonel DINSMORE. It is for the trial of civilians for the occupied territory.

Mr. SMART. I might add, if you will forgive the personal reference, that I was a provost court overseas appointed by virtue of the proclamations which gave General MacArthur the authority, which subsequently was delegated down to the Sixth Division. My jurisdiction was 5 years con-

finement or $5,000, either one or both. I sat alone as one judge and I tried nothing but civilians not subject to the Articles of War.

In *Hearings before the Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess., on the Uniform Code of Military Justice,* T. H. King, National Judge Advocate Reserve Officers' Association, requested restriction of the jurisdiction of military tribunals by specific limitations, substantially in the form of the argument of petitioner herein, speaking as follows (p. 161):

> Now, the next thing, if I may say so, sir, to make this uniform military justice is to provide for military courts. We have got set up in European countries and in the Pacific, courts established by administrative fiat. They are set up to try people for things up to and including the death penalty, and they have left it to one man's word in the European theater as to whether they were to die or live or whether they will serve for 20 or 30 years.
>
> We do not know whether they are going to keep up the military courts when the civilians take over or not, and there is a question as to whether a military court can render a sentence of 10 years, if they are going to terminate their functions in 3 years.
>
> Why not determine exactly what authority the military have to set up courts.

> We read of military commissions; we read of provost courts; we now have military government courts. Who has jurisdiction over whom? The question in the Ybarbo case, which Senator Saltonstall spoke about, was raised as to which court had jurisdiction, if we can believe the press, and I think we can.
>
> Senator KEFAUVER. In other words, you want to take the right of the commander to reduce the sentence away from him?
>
> Mr. KING. No, I want the Congress through its legislative functions to set up or determine what courts will be established, which will affect the trial of citizens of the United States overseas. We have got more civilians over there who are subject to military government than we have got soldiers. It is amazing the number of civilians.
>
> Every State Department employee over there is subject to military government in Germany and Austria. All these people working for ECA are subject to military control in those occupied countries, and they are not entitled to a trial by jury, and there is no system established to give them a right of trial by jury.

In brief, the Committees of Congress were specifically informed that the concurrent jurisdiction defined in AW 15 had been interpreted to permit the trial of American civilians in occupied territory—and particularly a soldier's wife, such as petitioner—by military government

courts instead of courts martial. With such knowledge, Congress neither amended nor deleted AW 15; rather, it reenacted AW 15 practically verbatim as Article 21 of the new Code. Both Committees reported that "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U. S. 1 (1942))." S. Rept. 486, p. 13, H. Rept. 491, p. 17, both 81st Cong., 1st Sess.

Moreover, in appropriating funds for the government of occupied areas, including Germany, for the fiscal years 1951 and 1952, Congress has specifically provided that such funds may be used for "expenses incident to maintaining discipline and order in occupied areas (*including trial and punishment by courts established by or under authority of the President*)." [Italics added.] Public Law 759, 81st Cong., 2d Sess., ch. XI, Title III; Public Law 253, 82d Cong., 1st Sess., ch. IX. Such appropriations constituted a Congressional ratification of what had been done. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.

II

THE COURT WHICH TRIED PETITIONER WAS PROPERLY CONSTITUTED AND ITS PROCEDURES ARE NOT INCONSISTENT WITH ANY ACT OF CONGRESS.

Under this point, we will discuss miscellaneous contentions made by petitioner.

1. Petitioner contends that since Mr. McCloy, the United States High Commissioner for Germany, is a civilian, he was without authority to create a military tribunal which, if is alleged, must be appointed by a military commander empowered to appoint a general court martial (Pet. 52–58). It may be that only a military commander can appoint a military tribunal to try soldiers, but that is not the present issue. Clearly, the President can exercise his powers as Commander in Chief in occupied territory through civilians entitled military governors or otherwise. In 1862, the President appointed civilian "military governors" of Tennessee, North Carolina and Louisiana; in 1865 civilian "provisional governors" were appointed by the President for North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina and Florida. Winthrop *op. cit.* 802. In *Handlin* v. *Wickliffe,* 12 Wall. 173, this Court apparently treated as valid the appointment of a civilian as military governor. In 1906, Mr. Taft, then Secretary of War, was appointed "Provisional Governor of Cuba," which was placed under military occupation. 1 Hackworth, *Digest of International Law,* 148–149. Precedents aside, it would be absurd, if constitutionally possible, to deny the President the power to discharge his functions in occupied territory through civilian officers. Since a civilian can be appointed by the President to be military governor of occupied territory, it follows that he, as well as a sol-

dier acting as military governor, may discharge the Nation's obligation under international law to maintain law and order by establishing military government courts. Moreover, Congress has expressly recognized that the President may carry out the government of occupied territories through other departments than the Department of Defense without thereby changing the fundamentally military basis of the occupation. In appropriating funds to the Department of the Army for the government or occupation of certain foreign areas (Act of October 6, 1949, c. 621, 63 Stat. 709, 712), Congress specifically provided that "the President may transfer to any other department or agency any function or functions provided for under this appropriation." And see Winthrop, *op cit.* 799, 801–802.

2. Petitioner further contends (Pet. 53) that military government courts must be composed of army officers. We may assume that a military commission or other military tribunal appointed to try soldiers must be composed of soldiers. But, again, it is well established that civilians may be appointed to act as judges of military government courts (*supra*, p. 23).

3. It is also contended that military government in Germany terminated on September 21, 1949, the date upon which the Allied High Commission became operative (R. 60) and the date upon which Mr. McCloy assumed the exercise of "all of the governmental functions of the United

States in Germany (other than the command of troops)" (R. 58–59, 67–68). From this petitioner concludes that when her offense, trial and conviction occurred in October 1949, the United States High Commissioner could not exercise the powers of military government to bring her to trial.[21] It is true that that date represents another step in the progressive restoration of self-government to the Germans. However, the nature of the governmental functions and tribunals of the United States in Germany is to be determined from the source of their authority. That source has been military conquest, followed by a military occupation which has continued to date. When a similar contention was made in *Neely* v. *Henkel, supra,* this Court replied that it is "the function of the political branch of the Government to determine when such occupation and control shall cease" (180 U. S. at p. 24).

4. Petitioner also contends that she could not be tried for a violation of the German Criminal Code. Clearly, it is the duty of the occupying power to deal with crimes committed by its civilian nationals by prescribing substantive penal law, as well as by establishing appropriate tribunals. It is the general law that local criminal law in an occupied area continues to bind civilians unless changed by the occupying power. *Dow* v. *Johnson,* 100 U. S. 158, 166; *Ketchem* v. *Buckley,*

[21] However, we assume that petitioner would oppose extradition to Germany for trial by a German court.

99 U. S. 188, 190. In addition to this, a proclamation of General Eisenhower of September 19, 1945, 12 Fed. Reg. 6997, provided that German law should be applicable in the occupied territory until repealed or superseded by a new law enacted by the military government.[22] General Crowder tells of the trial of two American soldiers in Cuba in 1906 under the local criminal code. *Supra*, p. 33. Similarly, Neely of *Neely* v. *Henkel, supra,* was extradited to Cuba to be tried for violation of the Cuban Postal Code promulgated under the authority of the military governor. Applying the German Criminal Code (purged of its Nazi additions) to American civilians in Germany was thus consistent with international law and historic American practice.

Moreover, it was highly appropriate and practical to adopt the German Criminal Code for this purpose. For one thing, the military government courts had jurisdiction not only over Germans but over other United Nations nationals in the American Zone, most of whom would be more familiar with a Continental code. Also, by

[22] The new Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which has been signed by the United States and is pending before the Senate, provides in Article 64, as follows:

"The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."

adopting the German Criminal Code for this purpose, we thereby established for such persons a uniform code of civil crimes throughout West Germany, since the British and French occupation authorities did the same thing. See British Ordinance No. 68, as amended, Article III.

5. Finally, petitioner contends that her conviction was void in that the military government court which tried her failed to follow the procedures prescribed by the Articles of War for courts-martial. Her contention is not that the procedure in the court which tried her is less fair than that of a court-martial or in any way unfair, but merely that it is different. First she asserts that "The practice and procedure normally followed in courts-martial cases must likewise be followed before a military commission, in a case such as this which does not involve an enemy national," citing *Manual for Courts-Martial*, 1949, Chap. 1, par. 2; Basic Field Manual, FM 27–5, 22 Dec. 1943; *In re Yamashita, supra;* 29 Va. L. R. 317; 32 Am. J. Int'l Law 832. (Pet. 53–54). The cited military authorities do not support petitioner's contentions but constitute suggestions and recommendations for practice with respect to military tribunals other than courts-martial.[23]

[23] The cited Basic Field Manual has been superseded by the 1947 Manual FM 27–5, October 14, 1947, which no longer contains even the language which petitioner urges as supporting her contentions. The earlier language of the 1943 Manual included the following (pp. 50–54):

Petitioner apparently relies upon this Court's suggestion in *In re Yamashita*, 327 U. S. 1, 20, that the Articles of War govern the trial before military commissions of "persons subject to mili-

"When an area is occupied and placed under military government, the commanding officer in the theater of operations should establish military commissions and provost courts to try inhabitants for offenses affecting the military administration. *These courts in general will not be circumscribed by the statutory and other rules governing courts martial;* and their number, types, jurisdiction and procedure will be determined by the theater commander, subject to instructions from higher authority. The term 'military courts,' as used in this manual does not include 'courts martial.' [Italics supplied.]

* * * * * * *

"In providing for military commissions, which may consist of any number of officers, the commander will appoint not less than three except in extraordinary circumstances. In general, the rules for army or navy general courts martial will serve *as a guide* in determining the compositions of military commissions, including the designation of law members, trial judge advocates, and necessary assistants. The provision for a law member, with powers and duties similar to those of a law member of an army general court martial, promotes sound decisions on matters of law and speed in procedure, and is *recommended* for such military commissions for both the army and the navy. [Italics supplied.]

* * * * * * *

"It is customary and *usually* advisable to appoint commissioned officers as members of military courts and as judge advocates and defense counsel. * * *. [Italics supplied.]

"Military commissions and provost courts may be appointed or convened by the officer in command in the theater of operations. He may delegate this power to subordinate commanders or civil affairs officers. * * *

* * * * * * *

"Military courts have jurisdiction over all persons within the occupied territory except those having diplomatic immu-

tary law as enumerated in AW 2" (Pet. 52). In that case, the Court held that AW 25 and AW 38 did not preclude the use of depositions and hearsay evidence in the trial before a military commission of a person other than persons enumerated in AW 2. Assuming that such of the Articles of War as AW 25, which specifically refer to

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nity, and except prisoners of war; but, *unless there are cogent reasons to the contrary* in a particular case, persons subject to military or naval law of the United States or its allies *should be* tried by court martial. [Italics supplied.]

* * * * *

"* * * It is *advisable* that military courts, in the trial of offenses directly affecting military government, be directed to follow the rules of evidence for Army or Navy courts martial. It is *not required* that this be done, however, as there may be instances when it will be appropriate to disregard such rules. * * *" [Italics supplied.]

The language of the 1947 Manual specifically abrogating even the indirect implications which petitioner seeks to derive from the earlier manual is as follows (p. 66):

"Military government tribunals are not governed by the provisions of the Manual for Courts-Martial nor by the limitations imposed on courts-martial by Articles of War. Experience has demonstrated that in administering justice in an occupied area it is desirable to follow forms of judicial procedure which are generally similar to the forms of procedure to which the people are accustomed. * * *".

Again, it is true, as contended by petitioner (Pet. 41), that General Crowder, in 1916, referred at one point to courts-martial and other military tribunals as having "the same procedure," but the remark was clarified in the same discussion by his quotation from Winthrop describing the procedure as only an "analogy of courts-martial" (S. Rept. No. 130, 64th Cong., 1st sess., p. 40).

military tribunals generally, apply to the trial by any military tribunal of persons enumerated in Article 2, it by no means follows that the composition and procedure of military tribunals other than courts-martial must be governed in all other respects by the Articles of War. While AW 25, dealing with depositions, specifically referred to military tribunals, AW 4 and 8, prescribing the qualifications of members of courts-martial and of persons appointing them, made no reference to military tribunals other than courts-martial. Nor can AW 38 be extended to serve such a purpose, for AW 38 merely *authorized* the President to prescribe the procedure of "courts martial, courts of inquiry, military commissions, and other military tribunals"—authority which he has never exercised except with respect to courts-martial. Since the Manual for Courts-Martial (1949) is expressly limited to the proceedings of courts-martial, it is evident that the President has not exercised his authority to prescribe uniform rules for other military tribunals, but, through his troop commanders and military governors, has adopted procedures suitable for particular situations. Moreover, such a complete assimilation of the composition and procedure of all types of military tribunals to courts-martial would render meaningless the choice of tribunals

which AW 15 sought to preserve in those cases which prior to 1916 were not triable by courts-martial. Nor can it be assumed that when an informed Congress in 1950 reenacted AW 15 as Article 21 of the Code of Military Justice, it was merely playing with words to preserve the jurisdiction of military government courts which, according to petitioner, must be general courts-martial in everything but name. This last consideration is equally applicable to every contention of petitioner treated under this point.

It is emphasized that petitioner does not allege violation of any Article of War which is specifically applicable to military tribunals other than courts martial.

CONCLUSION

Prior to 1916, only a military commission or military government court could have tried petitioner for murder committed in occupied territory. While the 1916 amendments to the Articles of War made petitioner subject to trial by court martial for that offense, AW 15 preserved the preexisting jurisdiction of other military tribunals. The interpretation of AW 15 and the policy to provide essentially civilian courts for the trial of American civilians in occupied Germany have been ratified by Congress. Accord-

ingly, the judgment of the court below should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

ROBERT W. GINNANE,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

JOHN M. RAYMOND,
Assistant Legal Adviser,
Department of State.

JANUARY 1952.

APPENDIX A

The Constitution, Art. II, Sec. 2 provides:

> The President shall be Commander in Chief of the Army and Navy of the United States * * *.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 Subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> ART. 2 [10 U. S. C. 1473]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
>
> * * * * * *
>
> Art. 12 [10 U. S. C., Supp. IV, 1483]. General courts martial.

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals * * *.

Art. 15 [10 U. S. C. 1486]. Jurisdiction not exclusive.

The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U. S. C. Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

Art. 92 [10 U. S. C. Supp. IV, 1564]. Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not

premeditated, he shall be punished as a court-martial may direct. * * *: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

U. S. GOVERNMENT PRINTING OFFICE: 1952